In The

Supreme Court of the United States

October Term, 1978

No.

WILLIAM S. HERRMANN,

Petitioner,

78-583

vs.

LEONARD P. MOORE, ABRAHAM M. LINDENBAUM, PAUL WINDELS, WILLARD G. HAMPTON, WILBUR A. LEVIN, MICHAEL CHARLES O'BRIEN, JEROME PRINCE, HOLLIS K. THAYER, M. HENRY MARTUSCELLO, EDWARD THOMPSON, CECILY SELBY, JOHN DOAR, MICHAEL P. SHUMAECKER, ERIC NELSON, BROOKLYN LAW SCHOOL, RAYMOND E. LISLE, GERARD A. GILBRIDE, MILTON GABRIEL GERSHENSON, JOSEPH CREA, SAMUEL HOFFMAN, JOHN J. MEEHAN, PHILIP K. YONGE, RICHARD T. FARRELL, MARTIN R. HAUPTMAN, JEROME M. LEITNER, DAVID G. TRAGER, HENRY MARK HOLZER, OSCAR CHASE, BRIAN E. COMERFORD, RICHARD ALLAN, MARGARET A. BERGER, GEORGE W. JOHNSON, SUSAN M. BRANDT, DEBORAH H. SCHENK, PAUL SHERMAN, GARY A. SCHULTZE, DUSAN DJONOVICH, STEVEN S. ELBAUM AND S. HAL MERCER IV,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner, William S. Herrmann, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed a judgment of the United States District Court for the Eastern District of New York which judgment dismissed petitioner's complaint pursuant to FRCP 12(b).

OPINION BELOW

The May 10, 1978 opinion of the court of appeals, whose judgment also dated May 10, 1978, is herein sought to be reviewed, is reported at 576 F.2d 453 and is reprinted in the appendix to this petition (3a). The prior memorandum and opinion of the United States District Court for the Eastern District of New York which the court of appeals affirmed is not reported and is reprinted in the appendix to this petition (20a).

The judgment of the district court is reprinted in the appendix to this petition (19a).

JURISDICTION

The judgment of the court of appeals was entered May 10, 1978. On August 2, 1978, Mr. Justice Thurgood Marshall entered an order extending the time for the filing of this petition to and including October 8, 1978. A copy of said order is reprinted in the appendix to this petition (26a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) which is reprinted in the appendix to this petition (30a) and 42 U.S.C. §1984 which is reprinted in the appendix to this petition (35a).

QUESTIONS PRESENTED

1. What are the fundamental rights of parties and witnesses in the courts of the United States to participate in such proceedings without fear of coercion, intimidation, retaliation and injury?

2. Can a corporation be used as a shield to avoid liability under 42 U.S.C. §1985?

3. Can a court in a civil rights action deny a party the fundamental right to a jury trial by granting summary judgment

against him contrary to applicable decisions of this Court and which departs from the accepted and usual course of judicial proceedings?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the First, Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution which are reprinted in the appendix to this petition (27a) and the following statutes which are reprinted in the appendix to this petition at the page numbers following each statute: 28 U.S.C. §1254(1) (30a); FRCP, Rule 56, Title 28 U.S.C. (31a); 42 U.S.C. §1981 (34a); 42 U.S.C. §1983 (34a); 42 U.S.C. §1984 (35a); 42 U.S.C. §1985 (35a).

STATEMENT OF THE CASE

Petitioner instituted an action against respondents in the United States District Court, Eastern District of New York, under File No. 75C130, alleging violation of his rights under the First, Fifth and Fourteenth Amendments of the United States Constitution and under Title 42 U.S.C. Sections 1983 and 1985. Not cited but equally applicable was Title 42 U.S.C. Section 1981. The jurisdiction was based on Title 28 U.S.C. Sections 1331, 1332 and 1343.

The complaint which is set forth in the appendix to this petition (38a), charges that the defendants conspired to and did cause plaintiff to lose his position as a tenured professor of law because: the plaintiff was a party and witness in the United States District Court for the Eastern District of New York and courts of the State of New York in which several of the respondents herein were defendants; the plaintiff exercised his right of free speech in opposing the practice of racial discrimination at the defendant Brooklyn Law School; and, the plaintiff performed his duty as an attorney at law and officer of the federal district court and of the courts of the State of New York.

Respondents moved the district court to dismiss the complaint under FRCP 12(b)(1) and 12(b)(6). The district court issued a memorandum and order and entered a judgment granting defendants' motion and dismissed the complaint pursuant to FRCP 12(b). The said memorandum and order and judgment are reprinted in the appendix to this petition (19a-20a).

The district court found no cause of action under 42 U.S.C. §1985(2) because of the respondents' intimidation, threats and injuring of petitioner on account of his attending and testifying in a court of the United States. It held so because the action was initiated in a state court, to wit, *Herrmann v. Crea* filed April 2, 1973 in the New York Civil Court (25a).

The district court also found that the defendant Thompson, a Justice of the Supreme Court of the State of New York and Administrative Judge of the New York Civil Court threatened and interfered in that lawsuit while acting under "color of state law" with other respondents (24a).

However, the district court found that petitioner had no cause of action because Judge Thompson's threats and interference supposedly did not damage him (24a).

This finding was made despite the facts: that petitioner was dismissed from his position as a tenured professor of law; that he incurred additional legal fees and the chilling effect on petitioner's rights of free speech and access to the courts.

The district court found a different conspiracy in that respondents interfered with petitioner's freedom of expression in advocating racial equality and non discriminatory hiring policies in Brooklyn Law School which systematically excluded Blacks and other minorities from the faculty but held it not actionable under 42 U.S.C. §1985(2) (25a).

The court of appeals' opinion reads as if a trial had been conducted and testimony and evidence presented.

In fact, the respondents presented in support of their motion in the district court only one affidavit made by respondent Lisle, who was the dean of Brooklyn Law School and a defendant in the federal action (File No. 75C130) which was the basis upon which petitioner was fired. Lisle's affidavit consisted primarily of hearsay statements concerning events and proceedings of other individuals not within his personal knowledge.

None of the other thirty-six respondents including Judge Thompson, Messrs. Crea, Trager, Elbaum, Yonge, Holzer or Mercer, submitted any affidavits or facts in support of the respondents' motion.

On the other hand, petitioner submitted an affidavit in opposition to the motion to dismiss on personal knowledge with supporting papers and uncontroverted documentary evidence. No affidavits were filed in answer to these documents.

The court of appeals stated that the motion to dismiss the complaint below was treated as one for summary judgment. (Footnote 1, 576 F.2d 454, 6a). This despite the facts that: the court below granted the motion to dismiss under FRCP 12(b) (19a); at no time did the district court notify petitioner through his counsel that it was considering the motion before it as one for summary judgment; both courts below had the affidavit of only one respondent before it which consisted primarily of hearsay statements.

REASONS FOR GRANTING THE WRIT

I.

This Court should settle the fundamental rights afforded to litigants and witnesses in the courts.

Bounds v. Smith, 430 U.S. 817 established that access to the courts is a basic constitutional right.

This case is one of first impression dealing with the rights of a witness and litigant in civil litigation to appear and participate in court proceedings without fear of retaliation.

The court of appeals below stated as follows:

> "We agree with plaintiff's contention that the foregoing facts show that among the reasons for the discharge of plaintiff Herrmann was that he had attended the United States District Court for the Eastern District of New York and that he had testified in that Court." (576 F.2d 459, 18a).

The district court and court of appeals dismissed the complaint as to intimidation and retaliation against petitioner as a party or witness in a state court on the ground that petitioner failed to prove a "class-based" or "other invidiously discriminating animus" (576 F.2d 458, 14a-15a).

Both courts below made the finding that petitioner failed to prove a "class-based" or "other invidiously discriminating animus."

There is a sparsity of cases dealing with actions where parties were coerced, intimidated or retaliated against because they were witnesses and litigants before the courts under Section 1985(2). Other than the case in this petition there are four

reported cases. All of them agree that no "class-based" or "other invidiously discriminating animus" is required to sustain such an action.

1. *Brawer v. Horowitz,* 535 F.2d 830 was decided by the Third Circuit Court of Appeals on May 12, 1976. It dealt with individuals who had been convicted of crimes and claimed such conviction was predicated upon perjury and the concealment of exculpatory evidence by the prosecutor and witnesses.

The court on page 840 stated as follows:

> "The first half of Section 1985(2) aims at conspiracies the object of which is intimidation of or retaliation against parties or witnesses or grand or petit jurors, in any court of the United States. The federal nexus, then, is not the class-based, invidiously discriminatory animus required by the second half of the subsection, but the connection of the proscribed activities to a federal court."

2. *Crawford v. City of Houston, Texas,* 386 F. Supp. 187 (S.D. Tex., Houston Div.) is a district court case.

The plaintiff in that action was employed by the Police Department of Houston as a professional chemist and toxicologist. He alleged that disciplinary measures taken against him by the defendants were in part prompted by the testimony he gave in state court proceedings.

The court held that the plaintiff stated a cause of action under Section 1985(2) and that the direct language therein drew that situation within the jurisdiction of the court.

The court further held at page 192 of its opinion that Section 1985(2) provides a federal remedy if two or more

persons conspire to deter any party or witness in any court of the United States from attending such court or from testifying to any matter pending therein freely, fully and truthfully or to injure such party or witness in his personal property on account of his having so attended or testified.

3. *Kelly v. Foreman,* 384 F. Supp. 1352 (U.S.D.C., S.D. Tex., Houston Div.).

The plaintiff in that case sued under Section 1985(2) claiming that the defendants intimidated and threatened him to refrain from appearing as a witness against them and that as a result he was damaged.

The court held the plaintiff stated a cause of action and stated on page 1355 of its opinion:

> "It is logical to assume that Congress intended by the language of Section 1985(2) before the semicolon to protect specific activities vital to the functioning of the courts of the United States without requiring any allegation or proof of invidious discrimination."

4. *Commonwealth of Pa. v. Local U. No. 542, Int. U. of Op. Eng.,* 347 F. Supp. 268 was a case in the United States District Court for the Eastern District of Pennsylvania decided on August 12, 1974.

Judge Higgenbotham wrote a learned opinion detailing the history, background and foundation of holdings under the civil rights statutes from their enactment through the time of the decision. Among other things he dealt with the court's inherent power to protect federal court litigants from violence, intimidation and harassment. The court at page 298 stated as follows:

> "[I] expressly hold that the rights protected by Section 1981, — '. . . to sue, be parties, [and] give evidence . . .' are as fundamental as the property rights protected and sustained under Section 1982."

Further on page 298 the court again states:

> "Thus, Congress has provided in Section 1981 a remedy which has an additional constitutional basis under Section 2 of the Thirteenth Amendment for private acts which abridge the fundamental rights of all free men, — the rights 'to sue, be parties, [and] give evidence, . . .' freely without violence or intimidation."

Judge Higgenbotham in *Commonwealth of Pa. v. Local U. No. 542, Int. U. of Op. Eng., supra,* held that the rights to sue, be parties and give evidence are fundamental rights protected by Section 1981 and the Thirteenth Amendment of the Constitution which not only abolished slavery but was intended to eradicate the badges of slavery which intended that free people could resort to the courts without fear of intimidation and retaliation.

As recently as June 25, 1976, this Court in *McDonald v. Santa Fe Trail and Transp. Co.,* 427 U.S. 273 held that Section 1981 applies to all races and was not limited to Blacks.

This was confirmation of the earlier ruling in *Winston v. Lear-Siegler, Inc.,* 558 F. 2d 1266 where the Sixth Circuit Court of Appeals held that a White complainant stated a cause of action where he alleged damages resulting from his being fired by an employer as a result of his objecting to the previous firing of a Black employee.

The foregoing cases dealt with actions in the federal and in the state courts.

They dealt with public and private wrongs suffered by complainants who resorted to the courts of the United States.

In this case petitioner was intimidated and retaliated against because he became a party and a witness in both a federal and state court. There should be no artificial restriction setting different standards for witnesses and parties in the state courts of the United States as contrasted to federal courts of the United States.

It is submitted that the public policy of free, open and unrestricted access to all courts of the United States is and should be a right secured to all citizens under the First, Fifth, Thirteenth and Fourteenth Amendments of the Constitution and Title 42, United States Code, Sections 1981, 1983 and 1985.

A free people require independent, impartial courts of integrity in which they can appear and participate freely and openly as part of the democratic process without looking over their shoulders in fear of retaliation and damage.

The court of appeals below ruled that interference with state court proceedings was not federally protected without a showing of class-based or other invidiously discriminating animus.

This is in direct conflict with the decisions enunciated in other federal courts. It is an important question of federal law which has not been, but should be, settled by this Court.

II.

Can a corporation be used as a shield to avoid liability under 42 U.S.C. Section 1985?

1. On April 2, 1973, petitioner brought an action in the Civil Court of the City of New York against one of the respondents, Joseph Crea. Respondent Crea filed a counterclaim. The case came before Judge Kleiger (576 F.2d 455, 8a).

2. Thereafter, another respondent, Edward Thompson, who was the administrative judge of the Civil Court of the City of New York interfered with petitioner and the judge in that case.

3. On October 4, 1973, petitioner was told by respondent Thompson:

> "I want a withdrawal of your action from you and I want it right now; I have news for you, your case is going nowhere. I have spoken to Judge Kleiger and all the judges in Brooklyn know or will know about this case and you're going to lose it; the Board of Trustees (of Brooklyn Law School) are tired of your nonsense in bringing this action and they want it withdrawn and I am ordering you to withdraw it today." (576 F.2d 455, 456, 9a).

4. At the order of respondent Thompson, petitioner appeared before Judge Kleiger who told him:

> "I have had discussions with Judge Thompson concerning this matter and I am telling you, you had better withdraw your lawsuit or you will be in serious trouble at the law school. You will not get five cents recovery in your lawsuit and you better drop it." (576 F.2d 456, 10a).

5. When respondent Crea filed a counterclaim against petitioner, respondent Judge Thompson sent his chief law assistant, an employee of the court system, to act as personal attorney for respondent Elbaum who was a witness against petitioner (576 F.2d 456, Note 4, 11a; 48a).

6. A portion of the conspiracy and actions under color of state law involving respondents: Judge Thompson, Elbaum, Trager, Lindenbaum, Crea, Schumaecker and Lisle are detailed in a memorandum of Lisle dated May 1, 1974 (36a).

7. On January 28, 1975, petitioner filed an action in the United States District Court for the Eastern District of New York against the respondents Lisle, Crea, Yonge and Trager. The action was grounded in defamation and damage to property rights. The case is 75C130 and is awaiting trial at the present time.

8. On March 13, 1975, a trustees' special committee of respondent Brooklyn Law School found that the action still pending in the Eastern District (75C130) was not brought in good faith (576 F.2d 458, 16a).

9. On May 14, 1975, faculty members of Brooklyn Law School passed a resolution requesting that the *Herrmann v. Crea* action in the Civil Court of the City of New York, which was the other litigation pending, be included in a complaint against petitioner (576 F.2d 458, 16a).

10. On May 19, 1975, the board of trustees adopted a resolution back to the faculty to conduct a hearing on both actions then pending (576 F.2d 458, 16a).

11. Respondent Lisle regarded certain documents submitted to a court as being confidential and this became an added charge against petitioner (576 F.2d 458, 17a).

12. On July 10, 1975, respondent Holzer drew up specified charges regarding these court actions (576 F.2d 459, 17).

13. On September 13, 1975, petitioner was fired from Brooklyn Law School following a hearing on the charges (576 F.2d 459, 17).

14. The court of appeals found that among the reasons for petitioner's discharge was that he testified in court (576 F.2d 459, 18a).

15. Respondents Lisle, Crea and Yonge were members of the faculty who passed the resolution requesting that other legal proceedings involving them be included in charges to be brought against petitioner.

16. Respondents Lindenbaum, Thompson, Lisle, Crea, Hoffman, Yonge, Farrell, Leitner, Trager, Holzer, Chase, Comerford, Schenk, Schultz, Elbaum and Mercer testified as witnesses against petitioner in the hearing in August 1975 which resulted in petitioner being fired from his position at Brooklyn Law School.

17. The respondents in the instant case consist of individuals. Two of them, Elbaum and Mercer, held no position with Brooklyn Law School. Others were trustees. A different group were faculty members, while still others were in administration. Some served as members of special committees.

18. The multitudinous acts of the respondents complained of by petitioner in his complaint (38a) cover individual acts of many of the respondents from Crea and Judge Thompson in 1973 through Elbaum, Schumaecker, Lisle, Trager and Judge Thompson in 1974 and continuing through 1975 with Lisle, Crea, Trager and Yonge which culminated with Holzer's drawing of charges and the firing of petitioner.

The court of appeals below stated that they were bound by *Girard v. 94th St. & Fifth Ave. Corp.*, 530 F.2d 66. The *Girard* case cited *Rackin v. University of Pennsylvania*, 386 F. Supp. 992, which held there were different departments with their own responsibilities and functions and that the actions of the university were not actions of only one policy-making body but of several bodies, and that the allegations supported a claim of conspiracy among them.

In this case there were multiple acts taken by respondents against petitioner in their individual capacity and there were various committees and groups within Brooklyn Law School consisting of a board of trustees, faculty members, administrators and special committees. The acts taken by the respondents from April 1973 through September 1975 were not one act of a single business entity.

Jackson v. University of Pittsburgh, 405 F. Supp. 607 at page 613 followed *Rackin v. University of Pennsylvania*, 386 F. Supp. 992 as decisive law for that circuit rather than the case of *Dombrowski v. Dowling*, 459 F.2d 190 in the Seventh Circuit. It reiterated the position that an institution of higher learning could not hide behind the claim of corporate veil to protect violations of civil rights.

In *Beamon v. W.B. Saunders Co.*, 413 F. Supp. 1167, decided April 27, 1976 in the United States District Court for the Eastern District of Pennsylvania, Judge Fullam (see page 1176) refused to dismiss a civil rights complaint without presentation of evidence as to the number of acts of discrimination, the number of business entities or individuals involved, even though he did recognize that other courts had taken inconsistent positions with respect to the question of whether officials of a single corporation can conspire with one another.

Because of the conflict between the courts on the interpretation of a conspiracy for purposes of Section 1985 it is

submitted that the Supreme Court should settle this important question of federal law.

III.

The court below decided a federal question in a way contrary to the decisions of the Supreme Court and has departed from the accepted and usual course of judicial proceedings so as to warrant the granting of a writ of certiorari to review the judgments below.

After the service of the complaint (38a), respondents moved for an order pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure dismissing the complaint for want of subject matter jurisdiction and for failure to state a claim. It submitted in support of the motion an affidavit by respondent Lisle which consisted primarily of hearsay statements of happenings to other individuals and proceedings which were without his personal knowledge. None of the other respondents, including Judge Thompson, Crea, Trager, Yonge and Holzer, submitted affidavits on the motion.

Petitioner submitted an affidavit and supporting documents in opposition to the motion based on his personal knowledge.

The motion was argued as a motion to dismiss for failure to set forth a cause of action. At no time did the court notify petitioner or his counsel that it was considering the motion as one for summary judgment. It entered a judgment pursuant to FRCP 12(b) (19a).

In the memorandum and order in support of the judgment by Judge Pratt there were numerous findings of fact, based on the hearsay affidavit of the respondent Lisle. The first three pages (20a-22a) read like a summary of facts found by the court without a jury after a plenary trial.

The appeals court compounded the error (576 F.2d 454 Note 1) which states:

> "The foregoing introductory paragraph requires a brief explanation. After plaintiff filed his complaint, defendants in accordance with Fed. R. Civ. P. 12(b)(6) filed a motion to dismiss the complaint for failure to state a cause of action, and they also presented matters outside the pleadings so that the motion should be treated as one for summary judgment and disposed of as provided in Fed. R. Civ. P. 56. Plaintiff also presented his pertinent material."

The record does not reflect that the motion was considered as one for summary judgment nor that the court advised petitioner that it was doing so. The district court was aware that it was dismissing the complaint not as a motion for summary judgment but for failure to state a cause of action under FRCP 12(b). The court stated so in its judgment and again in its decision (19a).

It is obvious from reading the decision of the court of appeals below that they found petitioner's complaint to have alleged a cause of action. They then found that the proof submitted was not weighty enough for the petitioner to win the substantive case. On page 455 of its decision, the court of appeals states as follows: "To meet his burden of proving that Thompson, acting under color of office, subjected him to a deprivation of his constitutional rights, plaintiff offered evidence to the following effect:" it then continues listing specific findings of evidentiary matter throughout the rest of page 455 and part of 456. The court of appeals goes on to indicate that such evidence proved that in most of his actions connected with the case of *Herrmann v. Crea,* Thompson was acting in his capacity as a trustee of Brooklyn Law School and not in his capacity as a state court judge.

They did find ambiguities. When respondent Lisle ordered petitioner to get in touch with respondent Thompson, it is arguable that respondent Thompson was selected not only because he was a trustee but also because he was a deputy administrative judge of the court in which the petitioner had sued respondent Crea (576 F.2d 456, 10a).

It was plausible to contend that it was in his role as deputy administrative judge, respondent Thompson told petitioner that he spoke to Judge Kleiger and all the judges in Brooklyn knew or would know about this case and he was going to lose it (576 F.2d 456, 9a).

It could be that a genuine dispute existed between petitioner and respondents as to whether respondent Thompson sometimes acted under color of his office as deputy administrative judge in connection with *Herrmann v. Crea,* a legal action (576 F.2d 456, 10a).

The district court (24a) found that no damage accrued to the plaintiff as a result of Judge Thompson's actions. But the court of appeals held in its note 5 on page 456 of its opinion (11a) that their affirmance did not rest on petitioner's failure to show damages but on failure to show deprivation of any constitutional right.

The court of appeals was not dealing with the allegations of the complaint, they were dealing with actual findings of fact which were contrary in many instances to the court below and the record before it.

Not only did the court below fail to give notice that it was treating the motion made under FRCP 12(b) as a motion for summary judgment but neither it nor the court of appeals followed the requirements of Rule 56 in dealing with summary judgments. Subdivision (e) of Rule 56 requires that supporting and opposing affidavits be made on personal knowledge and

shall set forth such facts as would be admissible in evidence and show affirmatively that the affiant is competent to testify to the matters stated therein.

On the papers submitted by respondents only one affidavit was given to the court, that made by the respondent Lisle. His statements consisted primarily of hearsay relating to other respondents and proceedings most of which were without his personal knowledge.

None of the other respondents including Judge Thompson, Elbaum, Trager, Yonge and Crea, submitted affidavits or sworn testimony of any kind.

United States v. Bosurgi, 530 F.2d 1105, dealt with summary judgment. On page 1110 the opinion states:

> "Summary judgment is a drastic remedy to be granted only where the requirements of Rule 56 F.R.Civ.P. have clearly been met. A motion for such a judgment does not entitle the court to try issues of fact. Its function is limited to deciding whether there are any such issues to be tried. In making that determination 'it must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought . . . with the burden on the moving party to demonstrate the absence of any material factual issue genuinely in dispute'."

At page 1111 the court held that the only proper method of supporting a claim would be to furnish affidavits on personal knowledge or testimony under oath by the parties. On page 1112 the court of appeals went on to say that supporting and opposing affidavits shall be made on personal knowledge. Rule 56(e) imposed a mandatory requirement. The court on the same page stated that a party should not be denied a trial on the

merits because a district court does not find the opposing evidence to be convincing.

Heyman v. Commerce and Industry Insurance Co., 524 F.2d 1317 held that the "'fundamental maxim' remains that on a motion for summary judgment the court cannot try issues of fact; it can only determine whether there are issues to be tried. . . ." It reiterated that on a motion for summary judgment the court must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought. The court warned that summary judgment is a drastic device since its prophylactic function when exercised cuts off the party's right to present his case to the jury.

In *FLLI Moretti Cereali v. Continental Grain Co.,* 563 F.2d 563, decided October 12, 1977, the court held that the court below reached out to achieve a result not sought by the moving party and it failed to give such party against whom the summary judgment was entered an adequate and timely opportunity to address the issues on its own behalf. In this case the court below did not give petitioner an opportunity to address the motion as a motion for summary judgment and it also reached out to achieve a result not requested by the moving party.

The appeals court below by ignoring its own decisions has concurred with the district court in departing from the accepted and usual course of judicial proceedings to the detriment of the petitioner and it has also decided a basic federal question in a way in total conflict with the decisions of the Supreme Court and the requirements of FRCP 56. *United States v. Diebold, Inc.,* 369 U.S. 654; *Adickes v. Kress & Co.,* 398 U.S. 144; *Sartor v. Arkansas Natural Gas Corp.,* 321 U.S. 620.

CONCLUSION

Wherefore, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

s/ John F. Martin
Attorney for Petitioner

APPENDIX

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of May one thousand nine hundred and seventy-eight.

Present:

HON. JAMES L. OAKES
Circuit Judge

HON. EDWARD R. NEAHER

HON. CHARLES E. WYZANSKI
District Judges

WILLIAM S. HERRMANN,

Plaintiff-Appellant,

v.

LEONARD P. MOORE, ABRAHAM M. LINDENBAUM, PAUL WINDELS, WILLARD G. HAMPTON, WILBUR A. LEVIN, MICHAEL CHARLES O'BRIEN, JEROME PRINCE, HOLLIS K. THAYER, M. HENRY MARTUSCELLO, EDWARD THOMPSON, CECILY SELBY, JOHN DOAR, MICHAEL P. SCHUMAECKER, ERIC NELSON, BROOKLYN LAW SCHOOL, RAYMOND

Judgment of the United States Court of Appeals for the Second Circuit

E. LISLE, GERARD A. GILBRIDE, MILTON GABRIEL GERSHENSON, JOSEPH CREA, SAMUEL HOFFMAN, JOHN J. MEEHAN, PHILIP K. YONGE, RICHARD T. FARRELL, MARTIN R. HAUPTMAN, JEROME M. LEITNER, DAVID G. TRAGER, HENRY MARK HOLZER, OSCAR CHASE, BRIAN E. COMERFORD, RICHARD ALLAN, MARGARET A. BERGER, GEORGE W. JOHNSON, SUSAN M. BRANDT, DEBORAH H. SCHENK, PAUL SHERMAN, GARY A. SCHULTZE, DUSAN DJONOVICH, STEVEN S. ELBAUM AND S. HAL MERCER IV,

Defendants-Appellees.

FILED
May 10, 1978
A. Daniel Fusaro, Clerk

77-6184

Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

A true copy
s/ A. Daniel Fusaro
Clerk

s/ M. Heller
Deputy Clerk

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 646, Docket 77-6184

WILLIAM S. HERRMANN,

Plaintiff-Appellant,

v.

LEONARD P. MOORE, ABRAHAM M. LINDENBAUM, PAUL WINDELS, WILLARD G. HAMPTON, WILBUR A. LEVIN, MICHAEL CHARLES O'BRIEN, JEROME PRINCE, HOLLIS K. THAYER, M. HENRY MARTUSCELLO, EDWARD THOMPSON, CECILY SELBY, JOHN DOAR, MICHAEL P. SHUMA• ECKER, ERIC NELSON, BROOKLYN LAW SCHOOL, RAYMOND E. LISLE, GERARD A. GILBRIDE, MILTON GABRIEL GERSHENSON, JOSEPH CREA, SAMUEL HOFFMAN, JOHN J. MEEHAN, PHILIP K. YONGE, RICHARD T. FARRELL, MARTIN R. HAUPTMAN, JEROME M. LEITNER, DAVID G. TRAGER, HENRY MARK HOLZER, OSCAR CHASE, BRIAN E. COMERFORD, RICHARD ALLAN, MARGARET A. BERGER, GEORGE W. JOHNSON, SUSAN M. BRANDT, DEBORAH H. SCHENK, PAUL SHERMAN, GARY A. SCHULTZE, DUSAN DJONOVICH, STEVEN S. ELBAUM AND S. HAL MERCER IV,

Defendants-Appellees.

Opinion of the United States Court of Appeals for the Second Circuit

Argued March 7, 1978

Decided May 10, 1978

In a civil rights action brought by a tenured professor at law school seeking restoration to position as tenured law professor, to declare invalid the school's resolution removing plaintiff from office and to recover damages. The United States District Court for the Eastern District of New York, George C. Pratt, J., granted defendants' motion for summary judgment, and plaintiff appealed. The Court of Appeals, Wyzanski, Senior District Judge, held that: (1) plaintiff failed to show, as required by civil rights statute proscribing a deprivation of rights, that under color of law he had actually been subjected to deprivation of any constitutional rights when particular person, with whom defendants allegedly had conspired, while allegedly acting as state judge had adversely affected a suit involving plaintiff; (2) evidence failed to establish that defendants had dismissed plaintiff as a law professor or otherwise penalized him because of his advocacy of blacks or other minorities, and (3) a vote of faculty and trustee resulting in discharge of law school professor who had brought civil rights action against school did not constitute a conspiracy to deter professor from attending in court and from testifying in that suit in violation of federal civil rights statute proscribing conspiracy, since alleged conspiratorial conduct was essentially single act by a single corporation acting exclusively through its own trustees and employees.

Judgment affirmed.

Opinion of the United States Court of Appeals for the Second Circuit

1. Conspiracy 0— 7.5

Plaintiff failed to show, as required by federal civil rights statute proscribing a deprivation of rights, that under color of law he had actually been subjected to deprivation of any constitutional rights when particular person, with whom defendants allegedly had conspired, while allegedly acting as state judge had adversely affected a suit involving plaintiff, since after judge's intervention the case was transferred to another judge who granted plaintiff's motion to dismiss defendant's counterclaim and thereafter placed the case on the trial calendar. 42 U.S.C.A. §§1983, 1985(2, 3).

2. Conspiracy 0— 19

Proof that a discharged person is black or an advocate of blacks does not justify an inference that such person who caused the discharge was racially motivated within contemplation of civil rights conspiracy statute. 42 U.S.C.A. §§1983, 1985(3).

3. Conspiracy 0— 19

In action for conspiracy to deprive plaintiff of his civil rights, evidence failed to establish that defendants had dismissed plaintiff as a law professor or otherwise penalized him because of his advocacy of Blacks or other minorities. 42 U.S.C.A. §§1983, 1985(3).

4. Conspiracy 0— 7.5

A vote of faculty and trustees resulting in discharge of law school professor who had brought civil rights action against school did not constitute a conspiracy to deter professor from attending in court and from testifying in that suit in violation of federal civil rights statute proscribing conspiracy, since alleged

conspiratorial conduct was essentially single act by a single corporation acting exclusively through its own trustees and employees. 42 U.S.C.A. §1985(2).

John F. Martin, of Martin & Wiggins, New York City, for apppellant.

Eugene R. Scheiman, Frank W. Krogh, Thomas R. Jones, of Cahill Gordon & Reindel, New York City, for appellees.

Before OAKES, Circuit Judge, NEAHER, District Judge,* and WYZANSKI, Senior District Judge.**

WYZANSKI, Senior District Judge:

Plaintiff appeals from the District Court's summary judgment dismissing his claim on the merits.[1]

Plaintiff, William S. Herrmann was a tenured professor at defendant Brooklyn Law School until the school dismissed him on September 17, 1975. Plaintiff's confusing complaint names as defendants Brooklyn Law School and 38 individuals, including the dean of the school, some of its trustees, and some of its

* United States District Judge for the Eastern District of New York, sitting by designation.

** Senior District Judge for the District of Massachusetts, sitting by designation.

1. The foregoing introductory paragraph requires a brief explanation. After plaintiff filed his complaint, defendants in accordance with Fed. R. Civ. P. 12(b)(6) filed a motion to dismiss the complaint for failure to state a cause of action, and they also presented matters outside the pleadings so that the motion should be treated as one for summary judgment and disposed of as provided in Fed. R. Civ. P. 56. Plaintiff also presented his pertinent material.

faculty. Plaintiff alleges that he is a citizen of Connecticut and all defendants are citizens of New York, and that the District Court has jurisdiction under 28 U.S.C. §§1331, 1332, and 1343. As we read the complaint[2] it alleges violations of 42 U.S.C. §§1983, 1985(2) clause 1, 1985(2) clause 2, and 1985(3), as well as violations of the law of New York. Plaintiff prayed that the Court should direct Brooklyn Law School to restore him to his position as a tenured law professor, that the Court should declare invalid the school's resolution removing him from office, and that he recover two million dollars in damages.

After receiving all the material the parties chose to submit, the District Court on October 19, 1977 filed a memorandum opinion and entered judgment for defendants.

In his brief in this court plaintiff limits the questions presented to his claims under 42 U.S.C. §§1983, 1985(2) and 1985(3). We, therefore, rule that he has abandoned any claims which do not involve alleged violations of those statutes. Any claims which rest on local law and fall within the diversity jurisdiction statute, 28 U.S.C. §1332, are not before us.

It will be most convenient if we take the claims in the following order: (1) 42 U.S.C. §1983, (2) 42 U.S.C. §1985(3), (3) 42 U.S.C. §1985(2) claim 2, and (4) 42 U.S.C. §1985(2) claim 1.

The 42 U.S.C. §1983 Claim

42 U.S.C. §1983 provides that:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

2. Nowhere in the complaint does plaintiff refer specifically to 42 U.S.C. §1983 or §1985.

> State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

It is well-settled that in order to establish a claim based on 42 U.S.C. §1983, plaintiff must prove that at least one of the defendants acted under color of state law. *Monroe v. Pape,* 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961); *Grafton v. Brooklyn Law School,* 478 F.2d 1137 (2nd Cir. 1973).

In paragraphs 16, 17 and 18 of the complaint plaintiff in effect alleges that defendants conspired with Edward Thompson, the Administrative Judge of the Civil Court of the City of New York who, under color of state law, subjected him to the deprivation of his civil rights under the First, Fifth, and Fourteenth Amendments to the Constitution of the United States.

To meet his burden of proving that Thompson, acting under color of office, subjected him to a deprivation of his Constitutional rights, plaintiff offered evidence to the following effect:

[1] April 2, 1973, in the Civil Court of the City of New York plaintiff brought an action for slander against his colleague Professor Crea. Professor Crea filed a counterclaim. The case came before Judge Kleiger.

[2] Judge Edward Thompson, a defendant in the case at bar, was both Deputy Administrative Judge of the Civil Court

of The City of New York and a trustee of the Brooklyn Law School. Judge Thompson is the supervisor of Judge Kleiger, but the scope of Judge Thompson's authority as Deputy Administrative Judge is not described.

[3] On October 1, 1973 on the stationery of the Brooklyn Law School, Raymond E. Lisle, the Dean of the School, notified Professors Crea and Herrmann that Justice Thompson "expects to see you in his Chambers at 2:30 [later changed to 2:00] p.m. on Tuesday, October 2, 1973, with regard to the current litigation. He said he will ask Judge Kileger (sic) to be present."

[4] Plaintiff went to Judge Thompson's office on October 2, 1973, but Judge Thompson told plaintiff that this was the wrong day and to return October 4. Judge Thompson, then, had his chauffeur drive plaintiff back to the law school.

[5] October 4 plaintiff was ill and telephoned the dean's secretary, Ms. Dolores Kuebler, so to advise Judge Thompson. Shortly thereafter plaintiff received a telephone call from Ms. Kuebler "advising him that he was ordered to telephone Judge Thompson at once."

[6] Plaintiff telephoned Judge Thompson and had a conversation with him during which Judge Thompson said "Judge Kleiger, Professor Crea and Mr. Falzone [Crea's lawyer] are here with me what's wrong with you?" Plaintiff said he was ill. Judge Thompson then said, "I want a withdrawal of your action from you and I want it right now; I have news for you, your case is going nowhere, I have spoken to Judge Kleiger and all the judges in Brooklyn know or will know about this case and you are going to lose it; the Board of Trustees (of Brooklyn Law School) are tired of your nonsense in bringing this action and they want it withdrawn and I am ordering you to withdraw it today." Judge Thompson then ordered defendant to appear in Judge Kleiger's chambers in Brooklyn at a later date.

[7] Plaintiff thereafter appeared in Judge Kleiger's chambers. That judge said "I have had discussions with Judge Thompson concerning this matter and I am telling you, you had better withdraw your lawsuit or you will be in serious trouble at the law school. You will not get five cents recovery in your lawsuit and you better drop it."

[8] However, plaintiff did not drop his suit.

[9] October 8, 1976 Judge Dematteo, who had replaced Judge Kleiger, granted plaintiff's motion for summary judgment dismissing the counter-claim. The case is still pending in the Civil Court and has been placed on the trial calendar by plaintiff.

The foregoing evidence indicates that in most of his actions connected with the case of *Herrmann v. Crea,* Thompson was acting in his capacity as a trustee of Brooklyn Law School, and not in his capacity as a state court judge. But there are ambiguities. When Dean Lisle ordered plaintiff to get in touch with Thompson, it is arguable that Thompson was selected not merely because he was a trustee but also because he was Deputy Administrative Judge of the court in which plaintiff had brought suit against Professor Crea. Moreover, it is plausible to contend that it was in his role as Deputy Administrative Judge that Thompson said, if plaintiff quotes him correctly, that "I have spoken to Judge Kleiger and all the judges in Brooklyn know or will know about this case and you are going to lose it." So we cannot say that there is not a genuine dispute between plaintiff and defendants as to whether Thompson sometimes acted under color of his office as Deputy Administrative Judge in connection with *Herrmann v. Crea.*

[1] However, there is no genuine dispute between plaintiff and defendant that Thompson did not adversely affect that suit.

After Thompson's intervention, the case was transferred to Judge Dematteo who granted plaintiff's motion to dismiss defendant's counterclaim, and thereafter placed the case on the trial calendar, where it still is pending. Thus, plaintiff has failed to show, as is required by 42 U.S.C. §1983 that under color of law he actually[3] "subjected" plaintiff to the "deprivation" of any Constitutional rights.[4]

We do not need to consider in connection with 42 U.S.C. §1983 what Thompson did as a trustee in discharging plaintiff, because indisputably Thompson was then acting in a private capacity and not under color of state office.

Hence we agree with the District Judge's conclusion that with respect to plaintiff's claim based on 42 U.S.C. §1983 defendants were entitled to summary judgment.[5]

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3. We do not consider whether in the case of an unsuccessful conspiracy plaintiff has other remedies than those provided by 42 U.S.C. §§1983, 1985(2) and 1985(3). Plaintiff's grounds of appeal do not present any such question.

4. We have not overlooked plaintiff's allegation that when, in the action of *Herrmann v. Crea,* defendant Crea filed a counterclaim, plaintiff, for purposes of taking a deposition, subpoenaed Elbaum, a former student of Brooklyn Law School, Judge Thompson arranged to have his chief law assistant accompany Elbaum as his counsel. What Judge Thompson did in providing counsel for Elbaum did not subject plaintiff to deprivation of any right, privilege or immunity secured by the Constitution or laws of the United States. We do not perceive what Constitutional right plaintiff is invoking, but in any case there was no deprivation by this action of Judge Thompson's inasmuch as plaintiff prevailed on the counterclaim.

5. Our affirmance rests on plaintiff's failure to show *deprivation,* not on his failure to show damages. Cf. *Carey v. Piphus,* ___ U.S. ___, 98 S. Ct. 1043, 55 L. Ed. 2d 252 (1978).

The 42 U.S.C. §1985(3) Claim

42 U.S.C. §1985(3) provides a remedy

> "If two or more persons in any state . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws."

Despite the breadth of the language, the Supreme Court in *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S. Ct. 1790, 1798, 29 L. Ed. 2d 338, held that in order to maintain an action under §1985(3) "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirator's action."

To meet the requirement enunciated in *Griffin*, paragraph 16 of the complaint alleges that "the defendants conspired . . . to interfere with . . . his work on behalf of advancing the opportunities and equality of minority people to deprive him of his employment and to a livlihood [sic] for himself and the equal enjoyment of rights." Further statements in paragraphs 24 and 25 allege that defendants conspired to deny plaintiff equal protection of the laws because of plaintiff's "steps to change the defendants' policy so as to enable the defendant law school to hire minority employees" and because "they did not condone plaintiff's advocacy of racial equality and his opposition to the practice of racial discrimination that existed within Brooklyn Law School."

The only evidence which plaintiff offered to prove his allegations was (1) that the Brooklyn Law School had disproportionately few Black instructors, (2) that when plaintiff urged that the Committee on Faculty Selection propose a

qualified Black, Leon B. Appelwhaite, the Committee did not recommend him, and (3) that plaintiff was constantly advocating that more Blacks should be named.

Plaintiff does not point to a single instance where any of the defendants reprimanded plaintiff, disciplined him, refused him promotion or salary increase, or in any way expressed hostility to plaintiff because of his advocacy of Black persons or other minorities. All that is offered is a memorandum dated March 22, 1974 from Professor Yonge, Chairman of the Committee on Faculty Appointments to Dean Lisle. This memorandum, principally criticizes plaintiff for his absences from 30 of the 50 interviews held by the committee, and for usually refusing when present to participate in interviewing other than Blacks. The memorandum shows no hostility to Blacks, and indeed reports that in New Orleans the committee granted many more interviews, proportionately, to Black than to White applicants.

[2] Even if defendants have interfered with plaintiff's advocacy, there is no showing that they acted with a discriminatory animus. Proof that a discharged person is Black or an advocate of Blacks does not justify an inference that the person who caused the discharge was racially motivated.

[3] In short, there is no evidence that defendants dismissed plaintiff as a professor, or otherwise penalized him, because of his advocacy of Blacks or other minorities.

Hence we agree with the District Judge's conclusion that with respect to plaintiff's claim based on 42 U.S.C. §1985(3) defendants were entitled to summary judgment.

The 42 U.S.C. §1985(2) Clause 2 Claim

42 U.S.C. §1985(2) clause 2 provides for an action

> "if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws . . . ."

Paragraph 16 of the complaint alleges in words copied from 42 U.S.C. §1985(2), clause 2 that defendants conspired together "for the purpose of impeding, hindering, obstructing, and defeating the due course of justice with the intent to deny plaintiff the equal protection of the laws."

Since 42 U.S.C. §1985(2) clause 2 applies only to conspiracies with respect to judicial proceedings in a State or Territory, we assume that the complaint refers to an alleged conspiracy with respect to *Herrmann v. Crea,* an action plaintiff brought on April 2, 1973 in the Civil Court of New York or possibly *Herrmann v. Lisle, et al.,* an action which plaintiff brought on July 18, 1975 in the Supreme Court of the State of New York, County of Kings.

However, no matter to which state court proceedings the complaint refers, plaintiff in the case of a 42 U.S.C. §1985(2) claim, as in the case of a §1985(3) claim, bears the burden of proving that defendants had a "class-based" or other "invidiously discriminating animus." *Hahn v. Sargent,* 523 F.2d 461, 469 (1st Cir. 1975). As we have already observed, there is no evidence that defendants were motivated by the requisite animus.

Hence we agree with the District Judge's conclusion that with respect to plaintiff's claim based on 42 U.S.C. §1985(2) clause 2 defendants were entitled to summary judgment.

The 42 U.S.C. §1985(2) Clause 1 Claim

42 U.S.C. §1985(2) Clause 1 provides for an action

> "if two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of having so attended or testified . . . ."

In paragraph 16 of his complaint plaintiff, tracking the statutory language just quoted, alleges that defendants "conspired together to deter the plaintiff from attending the court and from testifying therein freely, fully, and truthfully and to injure him on account of so having testified."

The material submitted by plaintiff to the District Court and the brief submitted by plaintiff's counsel to this court show that the court referred to by paragraph 16 of the complaint is the United States District Court for the Eastern District of New York and that the relevant case is *Herrmann v. Lisle, et al.,* 75 C 130. The following are the material facts as to which there is no dispute:

> [1] January 28, 1975 plaintiff filed a complaint in the United States District Court for the Eastern District of New York against Dean Raymond E. Lisle and

Professors Joseph Crea, Philip K. Yonge and David G. Trager of Brooklyn Law School. This case is *Herrmann v. Lisle, et al.*, 75 C 130.

[2] Thereafter the Board of Trustees of Brooklyn Law School established a Special Committee, composed only of trustees, to consider whether or not Herrmann had undertaken the litigation in good faith. The trustees' Special Committee interviewed the litigants and a student referred to in the complaint and examined documents. The student had no other role than as a witness. The Special Committee concluded that Herrmann's suit was not in good faith. On March 13, 1975 the trustees' Special Committee petitioned a Faculty Hearing Committee to determine immediately whether the statements of the trustees' Special Committee warranted commencing proceedings leading to the removal of Professor Herrmann from the faculty of Brooklyn Law School.

[3] May 14, 1975 the Faculty resolved to request the trustees' Special Committee to broaden its petition to include all the law suits between Herrmann and members of the faculty.

[4] May 19, 1975 the Board of Trustees adopted a resolution requesting the Faculty to conduct a hearing on all aspects of Herrmann's litigation against members of the faculty.

[5] June 5, 1975 a special meeting of the faculty voted to hold a hearing as directed by the trustees. The faculty then addressed itself to problems of procedure.

[6] About June 5, 1975 plaintiff Herrmann through his attorney filed a motion in 75 C'130 before Judge Costantino, and referred to certain documents which defendant Lisle regarded as confidential.

[7] As counsel to the faculty, defendant Holzer prepared and served on plaintiff Herrmann about July 10, 1975 a set of specific charges with respect to Herrmann's conduct in connection with *Herrmann v. Lisle, et al.*, in the Eastern District of New York as well as other matters.

[8] From August 18 to August 21, 1975 the faculty held hearings on the charges.

[9] August 22 the faculty made a report of its findings.

The report shows that all the charges against Herrmann with respect to *Herrmann v. Lisle, et al.*, were proven, and substantially all the other charges were proven. The report states that The Faculty . . . after due deliberation, by secret written ballot and by majority votes makes the following recommendation to the Board of Trustees as to the sanction it deems appropriate, as requested by the Resolution of the Board of Trustees:

THAT PROFESSOR WILLIAM S. HERRMANN, JR. BE IMMEDIATELY SUSPENDED FROM ALL DUTIES AND FUNCTIONS. THAT HIS TENURE AT BROOKLYN LAW SCHOOL BE REVOKED, AND THAT HE BE DISMISSED FROM THE FACULTY OF BROOKLYN LAW SCHOOL.

[10] September 17, 1975, the Board of Trustees concurred in the recommendation, and dismissed plaintiff from his tenured professorship.

[4] We agree with plaintiff's contention that the foregoing facts show that among the reasons for the discharge of plaintiff Herrmann was that he had attended the United States District Court for the Eastern District of New York and that he had testified in that court. But we do not sustain his contention that defendants *conspired* to discharge plaintiff. Every one[6] of the defendants who was involved in the so-called conspiracy was either a trustee or faculty member of the Brooklyn Law School — which is admittedly an educational corporation — and was acting in that capacity in connection with the discharge.

In *Girard v. 94th and Fifth Avenue Corp.*, 530 F.2d 66 (2nd Cir. 1976) we recently applied, in connection with a case arising under 42 U.S.C. §1985(3), the familiar doctrine that there is no conspiracy if the conspiratorial conduct challenged is essentially a single act by a single corporation acting exclusively through its own directors, officers, and employees, each acting within the scope of his employment. That precedent binds us here.

Inasmuch as in the case at bar the complained-of injury was the discharge of plaintiff by the corporation, and inasmuch as each of the persons shown to have any purpose to further the discharge was a trustee or employee of the corporation and acting for it, we agree with the District Judge's conclusion that with respect to plaintiff's claim based on 42 U.S.C. §1985(2) clause 1 defendants were entitled to summary judgment.

Judgment affirmed.

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6. Defendant Elbaum the student who appeared as a witness before the committee of the trustees came at their request and did not share in or seek to further the discharge of plaintiff.

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

WILLIAM S. HERRMANN,

Plaintiff,

-against-

LEONARD P. MOORE, et al.,

Defendants.

Filed
Oct. 19, 1977

76 C 2269

A memorandum and order of Honorable George C. Pratt, United States District Judge, having been filed on October 19, 1977, granting the defendants' motion to dismiss the complaint pursuant to FRCP 12(b), it is

ORDERED and ADJUDGED that plaintiff take nothing of the defendants and that the complaint is dismissed.

Dated: Westbury, New York
October 19, 1977

s/ Lewis Orgel
Clerk

s/ Maryanne Guint
Deputy Clerk

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, PRATT, J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

WILLIAM S. HERRMANN,

Plaintiff,

-against-

LEONARD P. MOORE, et al.,

Defendants.

Filed
Oct. 19, 1977

Docket No. 76 C 2269

PRATT, J:

Plaintiff William S. Herrman was a tenured professor of law until his discharge by Brooklyn Law School on September 17, 1975. In early 1973, the dean and the faculty of the law school negotiated a revised salary schedule for faculty members. Meetings were held at which the performances of various faculty members were examined for the purpose of adjusting salaries. Many of these meetings became heated, and a variety of personal exchanges occurred. On April 2, 1973 plaintiff sued a fellow faculty member in state court for alleged defamatory remarks made during one such meeting. On April 4, 1973 the faculty requested that plaintiff discontinue the proceedings and settle his differences "with dignity".

In an attempt to settle this dispute, the dean offered his services and those of other faculty members and alumni to act as mediators. Plaintiff ignored this request, however, and subpoenaed a law student to testify at a deposition. After the student was deposed, plaintiff addressed a letter concerning the student to the Committee on Character and Fitness for Admission to the Bar of the Second Department accusing the student of perjuring himself in the deposition. The student was finally admitted to practice, but only after extended delay caused by plaintiff's letter.

Plaintiff also took the depositions of the dean and other faculty members in connection with his defamation action. He then filed another suit on January 28, 1975, this time in federal court against several faculty members and the dean. That action alleged counts of defamation and conspiracy to deprive plaintiff of employment. At that time, plaintiff was still employed by the law school.

The law school board of trustees, disturbed by the effects of these suits on the operations of the school, met to consider whether proceedings should be commenced regarding the propriety of plaintiff's actions. The board decided, however, that bringing the federal suit was an insufficient ground to warrant institution of proceedings against the plaintiff. When it was discovered that plaintiff had contacted the Character and Fitness Committee regarding the moral character of the witness student, however, the faculty met and adopted a resolution addressed to the board of trustees requesting the board to reconsider their prior refusal to commence proceedings against plaintiff.

On May 19, 1975, the board met, considered the faculty resolution, and resolved "to have the entire faculty of the law school conduct a hearing on whether or not the federal litigation begun by plaintiff was instituted to intimidate and coerce other

members of the faculty." The faculty then met and considered nine pages of charges against the plaintiff; the plaintiff was served with notice of the charges and the hearing date, and was provided time to prepare his responses. Plaintiff's response was the filing of another lawsuit, this time in state court, against the dean, the school, and other members of the faculty.

On September 17, 1975, the board of trustees concurred in the faculty's ultimate findings that several of the charges lodged against plaintiff had been proven, and that plaintiff's appointment should be revoked. Plaintiff was then dismissed. On December 29, 1975, plaintiff filed still another suit in federal court seeking review of the faculty proceedings. Judge Mishler dismissed that complaint for lack of subject matter jurisdiction on June 30, 1976.

Plaintiff then filed the instant complaint on December 16, 1976, and defendants have moved to dismiss pursuant to FRCP 12(b). For the reasons set forth below, the motion is granted.

THE COMPLAINT

The complaint alleges that defendants conspired to deter plaintiff from conducting his lawsuit for defamation "freely, fully, and truthfully" and to injure him for pursuing that cause; that defendants conspired to interfere with plaintiff's constitutional rights and privileges of free speech and access to the courts and courts' processes; that defendants conspired to deter plaintiff from his work advancing the rights of minority groups; and that defendants conspired to deprive plaintiff of equal protection of the laws. Plaintiff alleges that these acts were done "under color of state law" and deprived him of his rights under the first, fifth, and fourteenth amendments to the constitution. In addition, he alleges violations of the Civil Rights

Act, 42 USC §§1983 & 1985, and, curiously, Article 2 of the Constitution of the State of New York.*

DEFENDANTS' MOTION

Defendants correctly contend that to make out the §1983 claim and the first, fifth, and fourteenth amendment claims, some "state action" must be shown. Since none of defendants' activities were conducted "under color of state law", defendants continue, these claims must be dismissed.

Plaintiff presents two theories upon which state action might be premised. First, plaintiff suggests that Brooklyn Law School acts for certain purposes as an arm of the state. The issue here, however, is whether there exists a sufficient state nexus with the activities of the law school here to render its acts "state action". In *Taylor v. Consolidated Edison Co.*, No. 76-7374 (CA2, February 24, 1977), the Second Circuit stressed the need, even where substantial state involvement is shown, to demonstrate a nexus between the state and the particular activity challenged. The court there asked "whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." *Id.* slip op. at 1936-37, *quoting Jackson v. Metropolitan Edison Co.*, 419 US 345, 351 (1974). The court ultimately found that the state's involvement, no matter how extensive, was not responsible for the allegedly wrongful act. See also, discussion at Note, *Sex Discrimination in Private Universities as State Action*, 50 St. John's L Rev 316, 324 n41 (1975).

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* Article 2 of the New York Constitution is entitled "Suffrage" and since no connection has been drawn between "Suffrage" and the activities alleged in the complaint, that allegation is, therefore, disregarded.

Brooklyn Law School has been similarly challenged as an arm of the state in other litigation. In *Grafton v. Brooklyn Law School,* 478 F2d 1137 (CA2 1973), the Second Circuit affirmed Judge Orrin Judd's finding that the law school was completely private, and that compliance with the state education law plus receipt of some minor state grants did not render the school an agent of the state. As in *Taylor* and *Grafton,* the involvement of the state in this instant case was negligible. And even if the involvement were enough to render *some* of the law school's activities state action, dismissal of plaintiff would not be one such activity. Brooklyn Law School remains a predominately private law school.

Plaintiff alternatively contends that a state administrative judge conspired with the defendants to violate plaintiff's rights. The "state action" of the judge acting in his official capacity should, plaintiff argues, render the defendants' activities cognizable under §1983.

It is conceivable that the alleged activities of the state judge here might be considered to be "under color of state law", since the judge allegedly pressured plaintiff to discontinue his defamation action in state court. However, since any attempts on the part of the judge were wholly unsuccessful, and plaintiff pursued his action with even greater determination, no damage accrued to plaintiff as a result of those attempts. The crux of plaintiff's lawsuit here is that he was unjustly and improperly dismissed from his teaching position. The actions of the administrative judge, as detailed in the complaint, are unrelated to this damage. Although the particular administrative judge involved is also a trustee of the law school, his activities as trustee are purely private and thus not cognizable under §1983.

With regard to the §1985 claim, defendants have argued that the plaintiff has failed to state a cognizable claim because

there is no "class-based invidiously discriminatative animus". *Griffin v. Breckenridge,* 403 US 88 (1971). In response, plaintiff cites *Brawer v. Horowitz,* 535 F2d 830, 840 (CA3 1976), to demonstrate that the federal nexus of §1985(2) need not be class-based, but may be merely "the connection of the proscribed activities [deterring by intimidation or threat and injuring a party on account of his attending and testifying in a court of the United States] to a federal court." This reliance is misplaced, however, since the original cause of action here was initiated in state court. See *Herrman v. Crea,* filed April 2, 1973 (NY Civil Court).

Alternatively, plaintiff attempts to show membership in a class to make out "invidious class-based discrimination". Plaintiff proposes that because he is a champion of minority groups, the law school sought to remove him from his professorship. This appears to be more a "class contrived for litigation" than a readily cognizable and traditionally protected class. *See McClellan v. Mississippi Power and Light Co.,* 526 F2d 870 (CA5 1976). At best, these facts seem to present a conspiracy to interfere with freedom of expression rather than racial discrimination, see *Murphy v. Mount Carmel High School,* 543 F2d 1189 (CA7 1976); and, again, absent state action or a class based discrimination, such a claim is not cognizable under 42 USC §1985(2).

Accordingly, defendants' motion is granted and the complaint is dismissed.

SO ORDERED.

Dated: Westbury, New York
October 19, 1977

s/ George C. Pratt
GEORGE C. PRATT
U.S. DISTRICT JUDGE

ORDER OF MR. JUSTICE THURGOOD MARSHALL EXTENDING THE TIME TO FILE THE PETITION FOR WRIT OF CERTIORARI

SUPREME COURT OF THE UNITED STATES

NO. A-136

WILLIAM S. HERRMANN,

Petitioner,

v.

LEONARD P. MOORE, ET AL.

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 8, 1978.

s/ Thurgood Marshall
Associate Justice of the Supreme Court of the United States

Dated this 2nd

day of August, 1978

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION

Amendment I:

> **"Freedom of religion, speech and press; peaceful assemblage; petition of grievances**
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment V:

> **"Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property**
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIII:

"§1. Slavery abolished

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

§2. Enforcement

Section 2. Congress shall have power to enforce this article by appropriate legislation."

Amendment XIV:

"§1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§2. Apportionment of Representatives in Congress

Section 2. Representatives shall be apportioned among the several States according

to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

§3. Persons disqualified from holding office

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

§4. What public debts are void

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

§5. Power to enforce article

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

28 U.S.C. §1254:

"Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . ."

Rules of Civil Procedure, Rule 56:

"Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by

affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt."

As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

Civil Rights Acts:

42 U.S.C. §1981:

"Equal Rights Under the Law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

42 U.S.C. §1983:

"Civil Action For Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. §1984:

"Same; Review of Proceedings

All cases arising under the provisions of this Act in the courts of the United States shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are provided by law for the review of other causes in said court."

42 U.S.C. §1985:

"Conspiracy to Interfere With Civil Rights

First. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Second. If two or more persons in any State or Territory conspire to deter, by force,

intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Third. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by

force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

COMPLAINT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

WILLIAM S. HERRMANN,

Plaintiff,

-against-

LEONARD P. MOORE, ABRAHAM M. LINDENBAUM, PAUL WINDELS, WILLARD G. HAMPTON, WILBUR A. LEVIN, MICHAEL CHARLES O'BRIEN, JEROME PRINCE, HOLLIS K. THAYER, M. HENRY MARTUSCELLO, EDWARD THOMPSON, CECILY SELBY, JOHN DOAR, MICHAEL P. SHUMAECKER, ERIC NELSON, BROOKLYN LAW SCHOOL, RAYMOND E. LISLE, GERARD A. GILBRIDE, MILTON GABRIEL GERSHENSON, JOSEPH CREA, SAMUEL HOFFMAN, JOHN J. MEEHAN, PHILIP K. YONGE, RICHARD T. FARRELL, MARTIN R. HAUPTMAN, JEROME M. LEITNER, DAVID G. TRAGER, HENRY MARK HOLZER, OSCAR CHASE, BRIAN E. COMERFORD, RICHARD ALLAN, MARGARET A. BERGER, GEORGE W. JOHNSON, SUSAN M. BRANDT, DEBORAH H. SCHENK, PAUL SHERMAN, GARY A. SCHULTZE, DUSAN DJONOVICH, STEVEN S. ELBAUM AND S. HAL MERCER IV,

Defendants.

Plaintiff demands a
Jury Trial in This Action

Plaintiff, by his attorneys, for his Complaint, respectfully alleges as follows:

Complaint

FIRST: The plaintiff is a citizen of the State of Connecticut.

SECOND: That the defendants are citizens and residents of the State of New York, and the defendants, LEONARD P. MOORE, ABRAHAM M. LINDENBAUM and M. HENRY MARTUSCELLO are residents of this judicial district.

THIRD: That the cause of action herein arose and took place in this judicial district.

FOURTH: The matter in controversy exceeds TEN THOUSAND ($10,000.00) DOLLARS, exclusive of interests and costs.

FIFTH: This action arises under the First, Fifth and Fourteenth Amendments of the Constitution of the United States, and under Article II of the Constitution of the State of New York, and under Title 42 of the United States Code, Secs. 1983 and 1985, and this court has jurisdiction of the action under Title 28 of the United States Code, Secs. 1331, 1332 and 1343.

SIXTH: That the defendant, BROOKLYN LAW SCHOOL is an educational corporation duly organized and existing under the laws of the State of New York, and at all times herein mentioned operated a law school at 250 Joralemon Street, Brooklyn, New York.

SEVENTH: That since January 1955, until the events hereinafter set forth, plaintiff was a member of the faculty of the BROOKLYN LAW SCHOOL, and for some time past had been continuously a tenured Professor of Law at said law school.

EIGHTH: That plaintiff's employment as a tenured Professor of Law by the defendant, BROOKLYN LAW SCHOOL, was

pursuant to an employment agreement between said defendant and the plaintiff.

NINTH: That plaintiff is now and was at all times herein mentioned, a Commissioner of Human Rights in the City of Stamford, State of Connecticut, and as an individual has espoused the cause of equal rights and opportunities for all people, regardless of race, religion or national origin, color, sex or age and as a member of the faculty of BROOKLYN LAW SCHOOL continued espousing the foregoing policies for the said BROOKLYN LAW SCHOOL.

TENTH: That the plaintiff, in his advocacy of equal rights, strongly advocated racial equality and equal employment opportunities.

ELEVENTH: That on or about April 1973 plaintiff, as an individual, caused an action to be commenced against a Professor of BROOKLYN LAW SCHOOL and said action is now awaiting trial in the Civil Court of the City of New York, Kings County.

TWELFTH: On or about January 28, 1975 plaintiff caused an action to be commenced in the United States District Court for the Eastern District of New York against RAYMOND E. LISLE, JOSEPH CREA, PHILIP K. YONGE and DAVID G. TRAGER, all of whom were at that time members of the faculty of BROOKLYN LAW SCHOOL, wherein plaintiff charged the defendants with conspiring to deprive the plaintiff of his property and Constitutional rights. Said action is still pending.

THIRTEENTH: On or about July 18, 1975 plaintiff commenced an action in the Supreme Court of the State of New York, County of Kings naming as defendants therein the defendants BROOKLYN LAW SCHOOL and RAYMOND E. LISLE, MILTON GABRIEL GERSHENSON and HENRY

MARK HOLZER, all of whom were on the faculty of BROOKLYN LAW SCHOOL at that time, and such action requested, among other relief, an injunction restraining the defendants and other persons acting on their behalf from taking any action affecting the status of plaintiff as a tenured member of the faculty of BROOKLYN LAW SCHOOL, and for money damages to that date. Said action is still pending.

FOURTEENTH: Under the employment agreement between the plaintiff and the defendant, BROOKLYN LAW SCHOOL, there were regulations regarding appointment, reappointment, tenure, promotion and dismissal, and the defendants conspired and took acts and steps to circumvent, avoid and contravene the said regulations, so as to make them inapplicable to the plaintiff.

FIFTEENTH: That the defendant, EDWARD THOMPSON, is a Justice of the Supreme Court of the State of New York, and Administrative Judge of the Civil Court of the City of New York. The defendant, LEONARD P. MOORE, is a Judge of the United States Court of Appeals. The defendant, M. HENRY MARTUSCELLO, is a Justice of the Supreme Court of the State of New York, Appellate Division, Second Department.

SIXTEENTH: That from April 1973 the defendants conspired together to deter the plaintiff from attending in court and from testifying therein freely, fully and truthfully and to injure him on account of his having so attended or testified and conspired together for the purpose of impeding, hindering, obstructing and defeating the due course of justice with the intent to deny plaintiff the equal protection of the laws and commenced a series of actions and took steps to harass the plaintiff to interfere with his Constitutional privileges and rights of free speech, access to courts and court processes, his work on behalf of advancing the opportunities and equality of minority

people and to deprive him of his employment and to a livlihood for himself and the equal enjoyment of rights secured by the law to all citizens.

SEVENTEENTH: That among the actions taken by the defendants, the said defendants conspired together with the defendant, EDWARD THOMPSON, who was the Administrative Judge of the Civil Court of the City of New York, to impede, hinder, obstruct, deter and defeat the due course of justice with intent to deny to the plaintiff the equal protection of the laws and to injure him and his property rights and Constitutional rights, while he was lawfully attempting to and enforcing his rights to the equal protection of the law.

EIGHTEENTH: That the acts on the part of the defendants and the procedures and proceedings used by the defendants were illegal and wrongful and were done under color of law to deprive the plaintiff of his civil rights under the First, Fifth and Fourteenth Amendments of the Constitution of the United States, and under the Constitution of the State of New York, and under the Statutes and Laws of the State of New York and the United States of America.

NINETEENTH: That the actions on the part of the defendants were part of the conspiracy against the plaintiff as hereinabove and hereafter enumerated, and were in no way related to his ability and competence as a Professor of Law, but were initiated and carried through by the defendants to deprive the plaintiff of his civil rights and Constitutional rights and his enforcement of his rights, and his advocacy of the rights of minorities.

TWENTIETH: As a result of the actions and conspiracies on the part of the defendants, the plaintiff has lost his employment and tenure as a Professor of Law at the BROOKLYN LAW SCHOOL; he has been caused to suffer

great mental anguish, strain and embarrassment; his academic freedom has been seriously impaired; his reputation and standing and prestige in the educational community have been severely damaged; his rights to speak out openly in favor of and to advocate racial equality of employment have been seriously impaired; he has lost his property right of employment and tenure; and his pension rights have been seriously impaired and diminished.

TWENTY-FIRST: The defendants were engaged in a scheme and conspiracy designed and intended to deny and deprive plaintiff of rights guaranteed to him under the Constitution and Laws of the United States and of the State of New York, and particularly those hereinabove enumerated.

TWENTY-SECOND: That as a direct consequence and result of the acts of the defendants, the plaintiff suffered anxiety and distress and lost substantial sums of money, as well as his job and tenure.

TWENTY-THIRD: The foregoing acts and actions on the part of the defendants deprived the plaintiff of the equal privileges and immunities granted him under the Constitution and Laws of the United States and the State of New York, and deprived him of the equal protection rights under such Laws and Constitutions.

TWENTY-FOURTH: That the defendants did, with purposeful intent, conspire to deny plaintiff equal protection and privileges and immunities of the laws by discriminating against the plaintiff as to compensation, tenure and terms and conditions of employment, when the plaintiff was best able and most competent to perform the services required, and such conspiracy and discrimination arose because of: plaintiff's support and advocacy of Constitutional and legal rights, including those protections enumerated in the Civil Rights Laws

of the State of New York and of the United States, and in the Constitutions of the State of New York and of the United States; his steps to change the defendants' policy so as to enable the defendant law school to hire minority employees in keeping with the equal employment opportunities granted to such minorities under the laws of the United States and of his enforcement of his rights to access to courts and court processes.

TWENTY-FIFTH: That the defendants did conspire purposefully and intentionally, to deny plaintiff the equal protection privileges and immunities of the laws by firing the plaintiff, and performed acts to humiliate and humble him in order that he would take no actions under his Constitutional rights and the statutes that protect him; further the defendants so conspired because they did not condone plaintiff's advocacy of racial equality and his opposition to the practice of racial discrimination that existed within BROOKLYN LAW SCHOOL; and his support and advocacy of free speech and access to courts and court processes. That such acts and actions as hereinbefore alleged were done solely to deprive the plaintiff of his rights.

TWENTY-SIXTH: That the dismissal of the plaintiff from his position as a tenured Professor of Law at BROOKLYN LAW SCHOOL caused him irreparable harm and injury, and unless he is restored to such position the defendants wrongful, illegal and improper acts, as hereinbefore alleged, will have achieved the desired results of the defendants.

TWENTY-SEVENTH: That the plaintiff was improperly unlawfully and wrongfully removed as a tenured Professor of Law at BROOKLYN LAW SCHOOL, and the Court should declare his removal and dismissal invalid and illegal.

WHEREFORE, plaintiff prays for the following relief:

1. That defendant BROOKLYN LAW SCHOOL be directed to restore the plaintiff to his position as a tenured Professor of Law;

2. That the resolution of the defendant BROOKLYN LAW SCHOOL revoking plaintiff's tenure and removing him as a Professor of Law be declared invalid, void and of no force and effect;

3. That the action pending in the Supreme Court of the State of New York, County of Kings, with the plaintiff as plaintiff against the named defendants under Index Number 13364/75 and the action pending in this Court with the plaintiff as plaintiff against defendants LISLE, CREA, YONGE and TRAGER under File Number 75C130, be consolidated with this action and be made a part of this action and proceeding;

4. For damages to the plaintiff and against the defendants in the sum of TWO MILLION ($2,000,000.00) DOLLARS;

5. Reasonable attorneys' f[illegible]

MARTIN, D'ERRICO &
WIGGINS, P.C.
Attorneys for Plaintiff
1010 Jericho Turnpike
New Hyde Park, New York 11040
516-354-7736

by_____
A Member of the Firm

MEMORANDUM TO FILE OF RAYMOND E. LISLE DATED MAY 1, 1974

BROOKLYN LAW SCHOOL

May 1, 1974

TO: FILE

FROM: RAYMOND E. LISLE

SUBJECT: HERRMANN VS. CREA

On April 29, 1974, Michael Schumaecker, an alumnus member of the Board of Trustees, telephoned to me to say he had been approached by Mr. Elbaum who had asked him to arrange for a special meeting of the Board of Trustees to authorize the employment of counsel to represent Mr. Elbaum in connection with the service of a subpoena upon him in the subject case. Mr. Schumaecker expressed his personal opinion that the School was obligated to provide appropriate legal representation for Mr. Elbaum in view of the fact that his involvement in the case arose solely from the fact that he was a student at Brooklyn Law School and had been in one of Professor Herrmann's classes. I felt this was not a valid reason for retention of counsel by the School itself. Mr. Schumaecker said he would seek to have a special meeting of the Board of Trustees called.

Soon thereafter, Judge Thompson called on another matter. I told him the circumstances and he said to tell Elbaum to do nothing until he, Judge Thompson, had an opportunity to talk to the attorneys. Judge Thompson said if this were ultimately desirable and necessary he could arrange that an attorney appear with Elbaum to protect his interests. He asked me to obtain certain data

which I procured from Professor Crea and gave to him by telephone a few minutes later. Professor Crea's attorney is Jesse Falzone. His telephone number is MA 5-7158. Professor Herrmann's attorney is Arthur J. Powers, whose telephone number is 227-0300. The subpoena is returnable in Special Term, Part II, Room 408 of the Civil Court of the City of New York, 141 Livingston Street. The judge to whom the case was originally assigned was Judge Klieger.

Professor Crea informed me that afternoon that his attorney had received a copy of the subpoena in question.

I told Mr. Elbaum late in the afternoon of my telephone conversation with Judge Thompson. At approximately 4:40 p.m. that afternoon Mr. Elbaum delivered to me his letter, dated April 29. He did not have a copy of subpoena with him and I asked him to provide one.

At noon on April 30, 1974, I reported the situation to some twelve members of the faculty. No consensus was reached as to what should be done but there was a general disposition which seemed to exist to await the results of action by Judge Thompson.

At approximately 10:00 a.m. on May 1, 1974, Mr. Elbaum gave me a copy of the subpoena. He said he would return at 4:00 p.m. the same afternoon to hear what I might have heard from Judge Thompson and perhaps to receive a reply to his letter of April 29.

At 11:30 a.m. on May 1, Mr. Lindenbaum, who had telephoned on various other matters, said he had received a copy of Elbaum's letter. I summarized the

Memorandum to File of Raymond E. Lisle Dated May 1, 1974

situation to Mr. Lindenbaum and he felt the need for an attorney was met by the possibility Judge Thompson would arrange for voluntary legal representation or by the fact that Professor Trager had enlisted the promised support of a former law associate who had agreed to represent Elbaum without charge. Mr. Lindenbaum saw no need of a special meeting of the Board of Trustees.

I telephoned Judge Thompson to inquire as to the present status of his efforts in the subject case. I told him that Steven Elbaum was becoming anxious. He said he had found that the entire file had been transferred to the Appellate Term and that an appeal from an order denying an application by the plaintiff to preclude the defendant from giving certain testimony was on the appellate term calendar for today. He called back shortly thereafter to tell me that he had found that the appeal had been dismissed and to tell Mr. Elbaum that Mr. Boyer, Chief Law Assistant to the Administrative Judge of the Civil Court, would accompany him to Court on Monday. Mr. Boyer may be reached at 566-2796. Judge Thompson said he was informed that Mr. Boyer was informed as to the circumstances. Judge Thompson noted down the room and time given in the subpoena.

Supreme Court, U. S.
FILED
NOV 13 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-583

WILLIAM S. HERRMANN,

Petitioner,

—against—

LEONARD P. MOORE, ABRAHAM M. LINDENBAUM, PAUL WINDELS, WILLARD G. HAMPTON, WILBUR A. LEVIN, MICHAEL CHARLES O'BRIEN, JEROME PRINCE, HOLLIS K. THAYER, M. HENRY MARTUSCELLO, EDWARD THOMPSON, CECILY SELBY, JOHN DOAR, MICHAEL P. SHUMAECKER, ERIC NELSON, BROOKLYN LAW SCHOOL, RAYMOND E. LISLE, GERARD A. GILBRIDE, MILTON GABRIEL GERSHENSON, JOSEPH CREA, SAMUEL HOFFMAN, JOHN J. MEEHAN, PHILIP K. YONGE, RICHARD T. FARRELL, MARTIN R. HAUPTMAN, JEROME M. LEITNER, DAVID G. TRAGER, HENRY MARK HOLZER, OSCAR CHASE, BRIAN E. COMERFORD, RICHARD ALLAN, MARGARET A. BERGER, GEORGE W. JOHNSON, SUSAN M. BRANDT, DEBORAH H. SCHENK, PAUL SI[illegible]RMAN, GARY A. SCHULTZE, DUSAN DJONOVICH, STEVEN S. ELBAUM and S. HAL MERCER IV,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS BROOKLYN LAW SCHOOL, *ET AL.*, IN OPPOSITION

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November 10, 1978

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IN THE

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WILLIAM S. HERRMANN,

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—against—

LEONARD P. MOORE, ABRAHAM M. LINDENBAUM, PAUL WINDELS, WILLARD G. HAMPTON, WILBUR A. LEVIN, MICHAEL CHARLES O'BRIEN, JEROME PRINCE, HOLLIS K. THAYER, M. HENRY MARTUSCELLO, EDWARD THOMPSON, CECILY SELBY, JOHN DOAR, MICHAEL P. SHUMAECKER, ERIC NELSON, BROOKLYN LAW SCHOOL, RAYMOND E. LISLE, GERARD A. GILBRIDE, MILTON GABRIEL GERSHENSON, JOSEPH CREA, SAMUEL HOFFMAN, JOHN J. MEEHAN, PHILIP K. YONGE, RICHARD T. FARRELL, MARTIN R. HAUPTMAN, JEROME M. LEITNER, DAVID G. TRAGER, HENRY MARK HOLZER, OSCAR CHASE, BRIAN E. COMERFORD, RICHARD ALLAN, MARGARET A. BERGER, GEORGE W. JOHNSON, SUSAN M. BRANDT, DEBORAH H. SCHENK, PAUL SHERMAN, GARY A. SCHULTZE, DUSAN DJONOVICH, STEVEN S. ELBAUM and S. HAL MERCER IV,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS BROOKLYN LAW SCHOOL, *ET AL.*, IN OPPOSITION

This brief is submitted on behalf of Respondents Brooklyn Law School, *et al.* ("BLS" or the "Law School") in opposition to the Petition for Writ of Certiorari filed herein by William S. Herrmann.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit (Wyzanski, J., sitting by designation) (Pet., pp. 3a-18a),* dated May 10, 1978, is reported at 576 F.2d 453, and will be cited throughout by the official report. That opinion affirmed the opinion of the District Court for the Eastern District of New York (Pet., pp. 20a-25a), granting Respondents' motion to dismiss, which is not reported and which will be cited throughout by page number of the Petition Appendix (*e.g.*, "Pet., p. ....a (D. Ct.)").

Counterstatement of Questions Presented

1. Did the Court of Appeals correctly decide that the second clause of 42 U.S.C. § 1985(2) (1970), providing a cause of action for certain injuries done "with intent to deny . . . equal protection of the laws" requires proof of a class-based discriminatory animus?

2. Did the Court of Appeals correctly decide that the dismissal of a faculty member by Brooklyn Law School, allegedly on account of his having brought a federal lawsuit, was the act of a single entity and thus could not have been carried out by a conspiracy of "two or more persons" under 42 U.S.C. § 1985(2)?

3. Was the Court of Appeals correct in treating the judgment of the District Court as one for summary judgment, where both Petitioner and Respondents submitted a large quantity of material outside the pleadings, and all of Petitioner's factual contentions were accepted as true?

* Material in the Appendices to Herrmann's Petition will be referred to as follows: "(Pet., p. ....a)". The Petition itself will be cited. "(Pet., p. ....)".

Constitutional and Statutory Provisions Involved

Petitioner contends that his rights under the First, Fifth and Fourteenth Amendments to the United States Constitution have been violated and seeks recovery under 42 U.S.C. §§ 1983 (1970) and 1985 (1970).*

Counterstatement of the Case

This action against Brooklyn Law School and 38 individuals connected with the Law School constitutes part of an incessant series of groundless, harassing and, thus far, singularly unsuccessful, lawsuits brought by Petitioner, a former professor at the Law School, against many of the same Respondents. Of his entire battery of litigations, none has been so frivolous as this "confusing" (576 F.2d at 454) putative civil rights action. Until now, the centerpiece of this lawsuit was the claim that Petitioner (an adult, white, male attorney) was dismissed from the Law School because of his membership in a "contrived" (Pet., p. 25a (D. Ct.)) class of persons advocating the rights of minorities. The Court of Appeals found that, accepting all of Petitioner's factual assertions as true, there simply was no evidence that his dismissal was on account of such advocacy. (576 F.2d at 457). Petitioner's failure to challenge this finding or to cite any

* The relevant constitutional provisions are reprinted in the Petition at 27a-30a. Sections 1983 and 1985 of Title 42 of the United States Code are reprinted in the Petition at 34a-37a.

Respondents note that in the melange of undifferentiated statutory and procedural provisions cited in this section of the Petition (Pet., p. 3), Petitioner has, for the first time, cited the Thirteenth Amendment to the United States Constitution and 42 U.S.C. § 1981 (1970). Respondents object to the whimsical invoking of a constitutional and a statutory provision which were neither cited in the complaint nor briefed at any prior point in this litigation.

evidentiary contention on this crucial issue underscores, and should be determinative of, the inappropriateness of a Supreme Court review of this case.

Factual Background

In early 1973, following heated salary negotiations at the Law School, Petitioner sued a fellow faculty member, Professor Crea, a Respondent herein, in New York City Civil Court for an allegedly slanderous statement apparently arising out of those discussions *(Herrmann* v. *Crea).** Efforts to mediate *Herrmann* v. *Crea* were undertaken, but in vain. (Pet., pp. 20a-21a (D. Ct.)). One of these attempts was made by Justice Edward Thompson, a Respondent herein, who was then both Deputy Administrative Judge of the City of New York and a trustee of the Law School. According to Petitioner, Justice Thompson, in his capacity as Deputy Administrative Judge, exerted pressure on him to withdraw his lawsuit against Crea. (Pet., pp. 4, 11).**

During the course of discovery in *Herrmann* v. *Crea*, Petitioner took the deposition of a student at the Law School, Steven S. Elbaum, and of the then Dean, Raymond E. Lisle. (Pet., p. 21a (D. Ct.)). Petitioner then wrote a letter to the Committee on Character and Fitness of Applicants for Admission to the Bar of the Appellate Division, Second Department, charging Elbaum with perjury at his deposition. After this charge was fully ventilated before the Committee, Elbaum was eventually admitted to practice, "but only after extended delay caused by [Petitioner's] letter." (Pet., p. 21a (D. Ct.)). Petitioner also brought an action against Dean Lisle, Professor Crea, and two other faculty members, all Respondents herein, in federal court, charging them with a conspiracy, *inter alia,* to deprive him of his "proper emolument as a professor of law" *(Herrmann* v. *Lisle).** (A.A., p. 57**; *see* Pet., p. 21a (D. Ct.)).

Petitioner's unfounded smear of Elbaum and his other disruptive behavior, including his filing of *Herrmann* v. *Lisle* in what was later determined to be bad faith *(see* 576 F.2d at 458-59), ultimately led to a petition to the faculty from a Special Committee of the Board of Trustees to inquire into these disruptions and "to report . . . its conclusions . . . and what . . . sanction it deems appropriate" (A.A., pp. 86-88). The necessary procedural steps were then taken to institute a hearing by the full faculty on the trustee petition. (576 F.2d at 458-59).

Petitioner's response to these developments was to institute another lawsuit, this time in New York Supreme Court, seeking to enjoin the proposed hearing *(Herrmann* v. *Brooklyn Law School).*** Following the denial of Petitioner's motion for a preliminary injunction against any further proceedings (A.A., pp. 151-154), the proposed faculty hearing was commenced on August 18, 1975. (576 F.2d at 459). After four days of hearings, at which Petitioner

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* Index No. 24915/73 (N.Y.C. Civil Ct. Kings Co., complaint served April 2, 1973).

** Throughout his papers, Petitioner has distorted the findings of the lower courts. He states in his Petition that:

> "The district court also found that the defendant Thompson, a Justice of the Supreme Court of the State of New York and Administrative Judge of the New York Civil Court threatened and interfered in that lawsuit while acting under 'color of state law' with other respondents. (24a)." (Pet., p. 4).

The District Court made no such finding and could not have done so on this motion.

* 75 Civ. 130 (CPS) (E.D.N.Y., complaint filed Jan. 28, 1975).

** References to the Appellant's Appendix to the Court of Appeals will be denominated "(A.A., p. .....)".

***Index No. 11364/75 (Sup. Ct., Kings Co., complaint served July 21, 1975).

chose not to appear, the faculty found that all but two of the allegations and part of a third were proven.* The faculty also found that several of the proven charges *independently* merited dismissal (A.A., pp. 156-160), and accordingly recommended to the Board of Trustees that Petitioner be dismissed and that his tenure be revoked. (576 F.2d at 459). On September 17, 1975, the Board of Trustees approved the recommendation of the faculty and dismissed Petitioner on the grounds stated therein. *(Ibid.)*

Petitioner's reaction to this dismissal was to bring, during the next fifteen months, three more lawsuits, including this one. The first, *In re Herrmann* v. *Brooklyn Law School,*** was dismissed for lack of subject matter jurisdiction. In the other, *Herrmann* v. *Moore,**** a companion case to the instant action, the individual defendants' motion to dismiss has been granted, and the Law School's summary judgment motion will be filed shortly.†

Proceedings in the District Court

Respondents moved to dismiss this action for lack of subject matter jurisdiction and failure to state a cause of

* Among the charges found proven were that Petitioner "improperly retaliated against Steven S. Elbaum for pursuing a complaint against [him]"; that Petitioner had "intimidated, ridiculed and humiliated students"; and that during an altercation with a student, "he made it apparent to the student in a menacing manner that he was then armed with a pistol." (A.A., pp. 37, 131-134, 157-158).

** 75 Civ. 2159 (JM) (E.D.N.Y., complaint filed Dec. 29, 1975).

*** Index No. 23498/76 (Sup. Ct. N.Y.Co., complaint served Dec. 16, 1976).

† Given what remains pending of Petitioner's avalanche of litigation (*Herrmann* v. *Lisle; Herrmann* v. *Brooklyn Law School;* and one count of the companion *Herrmann* v. *Moore* action), Herrmann would hardly be left remediless were the opinion below to be allowed to stand. *See Cole* v. *University of Hartford,* 391 F.Supp. 888, 893 n.10 (D.Conn. 1975).

action, based on an affidavit of Dean Lisle and a memorandum of law. For the most part, the Lisle affidavit contained a recitation of the background to Petitioner's discharge supported by documentary exhibits (A.A., pp. 24-216), almost all of which was undisputed by Petitioner in his lengthy affidavit in opposition to the motion (A.A., pp. 275-584).*

On October 19, 1977, the Hon. George C. Pratt granted Respondents' motion and entered judgment dismissing the complaint. Petitioner's Section 1983 claim depended on the existence of action under color of law, or "state action", which, in Petitioner's scenario, largely turned on the mediatory activities of Justice Thompson. The Court correctly held that in his role as Deputy Administrative Judge, Justice Thompson's alleged coercion in *Herrmann* v. *Crea* had no legally cognizable effect, as Petitioner continued to pursue that action "with even greater determination." (Pet., p. 24a (D. Ct.)).** As for Justice Thompson's alleged role in Petitioner's dismissal, the Court held that Justice Thompson's "activities as trustee are purely private and thus not cognizable under § 1983." (Pet., p. 24a (D. Ct.)).

The District Court then turned to Petitioner's claims under 42 U.S.C. § 1985. Section 1985(2) provides a cause of action, under certain circumstances, for anyone who has been injured on account of his having been a witness or party in a *federal court* (clause 1), and for any victim of a conspiracy to obstruct or defeat "the due course of justice in any *State . . . with intent to deny . . . equal protection of the laws*" (clause 2) (emphasis added). In his presentation to the District Court, Petitioner ignored

* By virtue of his duties and responsibilities in the Law School's administration, the Dean was, of course, in an entirely suitable position to present these matters.

** Even Petitioner made no claim to the contrary.

clause 2 of Section 1985(2) (*see* A.A., pp. 587-88), the focus of Point 1 of his Petition to this Court, and argued that he had stated a claim under clause 1, dealing with retaliation for participation in a federal lawsuit. The putative basis for his claim was that his discharge was in retaliation for having filed *Herrmann* v. *Lisle*. The District Court held, however, that the facts alleged in the complaint did not set forth the necessary cause and effect relationship (*i.e.*, injury to Petitioner resulting from participation in a federal action) to state a claim under clause 1. (Pet., p. 25a (D. Ct.)).

As for subsection 3 of Section 1985, providing a cause of action for anyone injured as a result of a conspiracy motivated by a "class-based, invidiously discriminatory animus", *see Griffin* v. *Breckenridge*, 403 U.S. 88, 102 (1971), the Court held that Petitioner's purported class—those who "champion . . . minority groups" (Pet., p. 25a (D. Ct.))—was " 'contrived for litigation' [rather] than a readily cognizable and traditionally protected class." (*Ibid.*) "At best," the Court concluded, Petitioner's allegations presented a possible claim of an interference with his "freedom of expression . . . and, . . . absent state action or a class-based discrimination, such a claim is not cognizable under" 42 U.S.C. § 1985. (*Ibid.*) Petitioner's complaint was therefore dismissed.

The Opinion of the Court of Appeals

Petitioner appealed the District Court's dismissal to the Court of Appeals for the Second Circuit, which affirmed on May 10, 1978. Dealing first with the Section 1983 claim, the Court of Appeals considered all the evidence offered by Petitioner "[t]o meet his burden of proving that Thompson, acting under color of office, subjected him to a deprivation of his Constitutional rights". (576 F.2d at 455).

As the District Court had found, however, even accepting all of Petitioner's fantastic accusations concerning Justice Thompson, the Court of Appeals held that "there is no genuine dispute between plaintiff and defendant that Thompson did not adversely affect" *Herrmann* v. *Crea*. (576 F.2d at 456). Petitioner, therefore, was unable to show a "deprivation" of any constitutional rights. As for his role as Law School trustee, Justice Thompson was "indisputably . . . acting in a private capacity." (*Ibid.*)

Turning to Petitioner's Section 1985(3) claim, the Court accepted as true all of the assertions offered by Petitioner below to support his claim of discrimination against advocates of minority rights. It found, however, that in all of the material submitted by Petitioner, he—

> "does not point to a single instance where . . . the defendants reprimanded [him], disciplined him, refused him promotion or salary increase, or in any way expressed hostility to [him] because of his advocacy of Black persons or other minorities . . . .
>
> . . . .
>
> "In short, there is no evidence that defendants dismissed [him] as a professor, or otherwise penalized him, because of his advocacy of Blacks or other minorities." (576 F.2d at 457).

The Court then dealt with Petitioner's claims under Section 1985(2). As for clause 2 thereof, relating to the alleged obstruction—"with the intent to deny . . . equal protection of the laws"— of Petitioner's use of state courts in *Herrmann* v. *Crea* and *Herrmann* v. *Brooklyn Law School*,* the Court held that the class-based discriminatory

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* In the course of its discussion of Section 1985(2), clause 2, the Court of Appeals mistakenly referred to *Herrmann* v. *Brooklyn Law School* as *Herrmann* v. *Lisle*. (576 F.2d at 458).

animus required by *Griffin, supra,* had not been shown. (576 F.2d at 458).

As for Petitioner's claim under Section 1985(2), clause 1, to the effect that he was discharged for having brought *Herrmann* v. *Lisle,* the Court considered all the evidence offered by Petitioner and found that his attendance in court in *Herrmann* v. *Lisle* was one of the several reasons for his discharge. Nevertheless, since every one of the alleged conspirators "was eitner a trustee or faculty member of the Brooklyn Law School . . . and . . . acting in that capacity in connection with the discharge" (576 F.2d at 459), Petitioner had not alleged a conspiracy of "two or more persons" under 42 U.S.C. § 1985. The District Court's opinion was, therefore, affirmed.

REASONS FOR DENYING THE WRIT

POINT I

Clause 2 of 42 U.S.C. § 1985(2) Requires a Showing of Class-Based Discriminatory Animus.

Petitioner's first point seems to be that clause 2 of Section 1985(2), dealing with obstruction of justice in the state courts "with intent to deny the equal protection of the laws," ought not to require proof of such an intent.* The

* Despite its vague caption—*i.e.*, "This Court should settle the fundamental rights afforded to litigants and witnesses in the courts" (Pet., p. 6)—the gist of this point appears to be Petitioner's displeasure with the fact that—

> "The court of appeals below ruled that interference with state court proceedings was not federally protected without a showing of class-based or other invidiously discriminating animus." (Pet., p. 10).

He asserts that—

> "This is in direct conflict with the decisions enunciated in other federal courts." (*Ibid.*)

requirement of a class-based animus set forth in *Griffin* v. *Breckenridge, supra,* is based on the modifying phrase in Section 1985(3), "with intent to deny . . . the equal protection of the laws." Petitioner suggests that the same phrase in clause 2 of Section 1985(2) ought not to be interpreted similarly.

Significantly, the foregoing is a complete reversal of Petitioner's presentation to the District Court, where, apparently anticipating defeat on the issue of class-based discrimination, he all but abandoned any claim under clause 2 of Section 1985(2):

> "The foregoing first half of Section 1985(2), 'aims at conspiracies the object of which is intimidation of or retaliation against parties or witnesses, or grand or petit jurers, in any court of the United States. The federal nexus, then, is not the *class-based, invidiously discriminatory animus required by the second half of the subsection,* but the connection of the proscribed activities to a federal court.' *Brawer* v. *Horowitz,* 535 F.2d 830, 840." (A.A., p. 587) (emphasis added).*

More significantly, the four cases which Petitioner cites (Pet., pp. 7-8) on this issue are directly contrary to the point he appears to be making. For example, the Court in *Brawer* v. *Horowitz,* 535 F.2d 830 (3d Cir. 1976), held that class-based discriminatory animus, while *not* applicable to clause 1 of Section 1985(2), *is* required under clause 2. This distinction rests on the difference in lan-

* Petitioner's argument to the Court of Appeals was to the same effect. Brief for the Appellant to the Court of Appeals, pp. 5-13.

This Court, of course, "[o]rdinarily . . . does not decide questions not raised or resolved in the lower court." *Youakim* v. *Miller,* 425 U.S. 231, 234 (1976). *Accord, Lawn* v. *United States,* 355 U.S. 339, 362-63 n.16 (1958); *California* v. *Taylor,* 353 U.S. 553, 557 n.2 (1957).

guage in the two clauses and on the court's reading of the legislative history of the Ku Klux Klan Act of 1871. 535 F.2d at 837-40. *See also Kelly* v. *Foreman,* 384 F.Supp. 1352 (S.D. Tex. 1974) (making the same distinction).

In sum, none of the cases cited by Petitioner supports his contention,* and two of them (*Brawer* and *Kelly*) explicitly hold that a class-based discriminatory animus *is* required under clause 2. This view is supported by the overwhelming weight of the case law in various circuits.**

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* *Crawford* v. *City of Houston,* 386 F.Supp. 187 (S.D.Tex. 1974), cited at page 7 of the Petition, involved retaliation on account of plaintiff's testimony in state courts. Retaliation on account of his testimony in federal courts evidently was also involved, however, since the court upheld plaintiff's Section 1985(2) claim only under the *first* clause thereof. 386 F.Supp. at 192.

Equally unhelpful to Petitioner is *Pennsylvania* v. *Local 542, Int'l Union of Operating Engineers,* 347 F.Supp. 268 (E.D.Pa. 1972), in which the plaintiffs were blacks who were harassed and intimidated on account of their bringing an employment discrimination suit in *federal* court, the classic class-based discriminatory retaliation which Section 1985(2) was intended to remedy. Although the use of the federal, and not state, courts was involved, Judge Higginbotham nevertheless was careful to note that the *Griffin* class-based animus test was met. *Id.* at 298-99. Indeed, an argument can be made that a class-based animus must be shown under *both* clauses of Section 1985(2). *See Jones* v. *United States,* 536 F.2d 269, 271 (8th Cir. 1976), *cert. denied,* 429 U.S. 1039 (1977) (holding that class-based animus is also required under clause 1).

** *Slavin* v. *Curry,* 574 F.2d 1256, 1262 (5th Cir. 1978); *Dacey* v. *Dorsey,* 568 F.2d 275, 277 (2d Cir. 1978); *Phillips* v. *International Association of Bridge Workers, Local 118,* 556 F.2d 939, 940-41 (9th Cir. 1977); *Smith* v. *Yellow Freight System, Inc.,* 536 F.2d 1320, 1322-23 (10th Cir. 1976); *Jones* v. *United States, supra; Hahn* v. *Sargent,* 523 F.2d 461 (1st Cir. 1975), *cert. denied,* 425 U.S. 904 (1976); *Brainerd* v. *Potratz,* 421 F.Supp. 836, 839 n.2 (N.D. Ill. 1976); *Kerckhoff* v. *Kerckhoff,* 369 F.Supp. 1165, 1166 (E.D. Mo. 1974); *McIntosh* v. *Garofalo,* 367 F.Supp. 501 (W.D.Pa. 1973); *Phillips* v. *Singletary,* 350 F.Supp. 297, 302 (D.S.C. 1972) (referring to §§ 1985(2) and 1985(3) as "kindred sections of a common statutory scheme").

POINT II

Petitioner's Dismissal Was the Act of a Single Entity and Therefore Not Actionable Under 42 U.S.C. § 1985(2).

In dismissing Petitioner's Section 1985(2) clause 1 claim, the Court below adhered to the well-established rule that agents of a single entity cannot conspire for purposes of Section 1985, citing *Girard* v. *94th St. & Fifth Ave. Corp.,* 530 F.2d 66 (2d Cir.), *cert. denied,* 425 U.S. 974 (1976). The weight of the case law overwhelmingly supports this view,* especially in an academic context. *See Cole* v. *University of Hartford,* 391 F.Supp. 888, 890 n.1 (D. Conn. 1975) (private university and officials thereof constitute single entity for purposes of alleged conspiracy involving "numerous discriminatory treatments" of discharged teacher).**

---

* *See Dombrowski* v. *Dowling,* 459 F.2d 190, 196 (7th Cir. 1972) (Stevens, J.); *Bellamy* v. *Mason's Stores, Inc.,* 508 F.2d 504, 508 (4th Cir. 1974) (Boreman, J., concurring); *Stewart* v. *New York University,* 430 F.Supp. 1305, 1317 n.12 (S.D.N.Y. 1976); *Jones* v. *Tennessee Eastman Co.,* 397 F.Supp. 815, 816 (E.D. Tenn. 1974), *aff'd,* 519 F.2d 1402 (6th Cir. 1975); *Fallis* v. *Dunbar,* 386 F.Supp. 1117, 1121-22 (N.D. Ohio 1974), *aff'd,* 532 F.2d 1061 (6th Cir. 1976); *Milburn* v. *Blackfrica Promotions, Inc.,* 392 F.Supp. 434, 436 (S.D.N.Y. 1974).

** *See also Rubenstein* v. *University of Wisconsin Board of Regents,* 422 F.Supp. 61 (E.D. Wis. 1976) (members of Board of Regents constitute single entity); *Chambliss* v. *Foote,* 421 F.Supp. 12, 15 (E.D.La. 1976), *aff'd,* 562 F.2d 1015 (5th Cir. 1977); *Keddie* v. *Pennsylvania State University,* 412 F.Supp. 1264, 1276 (M.D. Pa. 1976); *Cohen* v. *Illinois Institute of Technology,* 384 F.Supp. 202, 205 (N.D. Ill. 1974), *aff'd,* 524 F.2d 818 (7th Cir. 1975), *cert. denied,* 425 U.S. 943 (1976).

In an attempt to avoid the application of the two or more conspirators requirement of Section 1985(2), Petitioner cites *Beamon* v. *W.B. Saunders Co.*, 413 F.Supp. 1167, 1176 (E.D. Pa. 1976); *Jackson* v. *University of Pittsburgh*, 405 F.Supp. 607, 613 (W.D. Pa. 1975); and *Rackin* v. *University of Pennsylvania*, 386 F.Supp. 992, 1005-06 (E.D. Pa. 1974).* Those cases merely stand for the principle that "many continuing instances of discrimination", *Rackin, supra,* 386 F.Supp. at 1005, by agents of a single entity, acting in different capacities, are not necessarily a nonactionable single act of a single entity.

In an effort to bring himself within this group of cases, Petitioner lists his accusations in this matter, ranging from Justice Thompson's alleged coercion in *Herrmann* v. *Crea* to the putative unfairness of the proceedings leading to his ouster. (Pet., pp. 11-13). The problem with this approach, however, is that it obscures the narrowness of the lower court's holding. Only Petitioner's Section 1985(2) *clause 1* claim, relating to alleged retaliation on account of his filing of *Herrmann* v. *Lisle*, was dismissed on the basis of the single entity rule. All of the clause 2 allegations relating to *Herrmann* v. *Crea* were dismissed because of Petitioner's failure to show class-based discrimination. (576 F.2d at 458).

When the allegations relating to *Herrmann* v. *Lisle* are viewed in isolation, even generously supplemented by Petitioner's opposition papers in the District Court,* they all collapse into what is essentially one discriminatory act, namely Petitioner's discharge allegedly on account of his having brought *Herrmann* v. *Lisle*.** Petitioner's elaboration on the details of the proceedings which were a necessary prerequisite to his discharge cannot serve to transform his dismissal into several discriminatory acts by persons acting in different capacities at different times.***

Moreover, as Petitioner points out (Pet., p. 12), the proceedings leading up to his discharge were all carried out pursuant to the mandate of the Special Trustee Committee (576 F.2d at 458-59). Petitioner has pointed to no individual acts of discrimination with regard to *Herrmann* v.

---

* Once again, Petitioner is presenting to this Court a question which he failed to address in his brief to the Court of Appeals, even though Respondents briefed the conspiracy point before that Court, as they had at the District Court level (*see* A.A., pp. 263-65). *See Youakim* v. *Miller*, 425 U.S. 231, 234 (1976), and other cases cited at p. 11, *supra*, note.

* It should be noted that in *Beamon* v. *W.B. Saunders Co., supra,* the Court shied away from a dismissal based on the single entity issue because

> "[p]resentation of evidence on questions such as the number of acts of discrimination, and the number of business entities or individuals involved, should be taken. . . ." (413 F.Supp. at 1176-77).

Here, Petitioner was permitted to produce evidence as to all of these matters, and his fantastic scenario of judicial and academic oppression was accepted as true for purposes of this motion.

** Indeed, the only nonconclusory clause 1 allegation in Petitioner's complaint with respect to *Herrmann* v. *Lisle* is the charge, repeated several times, that he was discharged. *See* Complaint herein, ¶¶ 14, 20, 22, 25, 26, 27 (Pet., pp. 41a, 42a-44a). The Special Trustee Petition; the drawing up of charges against Petitioner, including charges relating to *Herrmann* v. *Lisle;* the hearing, including various of the Respondents' testimonies against Petitioner; and the trustees' ratification of the faculty's vote to discharge Petitioner, were simply consecutive elements of the same proceeding leading up to his discharge.

*** Petitioner's Section 1985(2) clause 1 claim is, therefore, distinguishable from *Rackin, supra,* which involved denial of tenure on two separate occasions and a transfer to another department.

Lisle outside the scope of the Special Committee's mandate.*

Petitioner's dismissal, allegedly on account of having filed *Herrmann* v. *Lisle,* must therefore be considered the single act of a single entity and, therefore, not actionable.**

POINT III

The Court of Appeals Properly Considered All of Petitioner's Factual Assertions in the Record and Treated the District Court's Decision as One for Summary Judgment.

Petitioner complains that since the District Court's judgment dismissing his complaint was rendered pursuant to FED.R.CIV.P. 12(b), and since he never received notice that Respondents' motion would be treated as anything but a Rule 12(b)(6) motion, the Court of Appeals erred in reviewing the decision as one for summary judgment. He then suggests (Pet., pp. 16-17) that the Court of Appeals, in effect, made findings of fact against him and that this procedure invalidates that opinion. A review of the Petition and the relevant authorities, however, shows that the District Court's opinion was properly treated as one for summary judgment; that no findings of fact were rendered against any factual contention made by Petitioner; and that Petitioner, even now, can point to no fact he might have introduced as to any issue resolved by the Court of Appeals.

* Petitioner asserts that Respondents Elbaum and S. Hal Mercer, another student, held no position with BLS (Pet., p. 13). Aside from the fact that Petitioner was completely silent in his briefing to the Court of Appeals as to those students' participation, no allegation of the complaint ties Elbaum or Mercer to any conspiratorial activity. Since they are not implicated in any specific allegation in the Complaint, no action may be maintained against them. *Buck* v. *Board of Elections,* 536 F.2d 522, 525 (2d Cir. 1976); *Rende* v. *Rizzo,* 418 F.Supp. 96, 98 (E.D.Pa. 1976).

More importantly, as the court below found, Elbaum appeared as a witness at Petitioner's hearing pursuant to the request of BLS "and did not share in or seek to further the discharge of plaintiff." (576 F.2d at 459 n.6). The same is true of Mercer, whose testimony had nothing to do with *Herrmann* v. *Lisle.*

** Although Petitioner appears to regard this issue as an academic version of "piercing the corporate veil" (Pet., p. 14), BLS "was obviously not incorporated in order to perpetuate . . . discrimination." *Cole* v. *University of Hartford, supra,* 391 F.Supp. at 893.

At the outset of its opinion, the Court of Appeals noted that:

> "After plaintiff filed his complaint, defendants in accordance with Fed.R.Civ.P. 12(b)(6) filed a motion to dismiss the complaint for failure to state a cause of action, and they also presented matters outside the pleadings so that the motion should be treated as one for summary judgment and disposed of as provided in Fed.R.Civ.P. 56. Plaintiff also presented his pertinent material." (576 F.2d at 454 n.1).

According to Professor Moore, this procedure was entirely appropriate. He explains that, in this regard, "labels do not control."

> "[W]here the trial court, in effect, properly treats such a Rule 12(b)(6) motion as one for summary judgment but erroneously characterizes its action as a ruling on a motion to dismiss for failure to state a claim, the ruling will be reviewed as if it had been a ruling on a motion for summary judgment." (footnote omitted). 6 J. MOORE, FEDERAL PRACTICE ¶ 56.02[3], at 56-33 (2d ed. 1976).

As Petitioner points out, the District Court did consider the affidavits submitted by the parties as well as the plead-

ings in reaching its decision. Accordingly, the Court of Appeals was only following the course outlined by Professor Moore.*

Moreover, the Court of Appeals correctly noted that the District Court received "all the material the parties chose to submit". (576 F.2d at 454). Petitioner's belated cry of surprise on this point (Pet., pp. 15-16) misses the mark. Nothing in FED.R.CIV.P. 12(b)—which expressly provides for Rule 12(b)(6) motions to be treated as motions for summary judgment when matters outside the pleadings are presented to the court—requires formal notice to either party. *See* 6 J. MOORE, *supra,* at ¶ 56.02[3]. The Rule only states that "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Certainly, the fact that Petitioner filed a lengthy affidavit illustrates both his awareness that the motion would no longer be considered strictly on the pleadings and the fact that he "had full and fair opportunity to submit all pertinent materials." 6 J. MOORE, *supra,* at ¶ 56.02[3].** *See also Fagan* v. *National Cash Register Co.,* 481 F.2d 1115, 1126 (D.C. Cir. 1973). There is, then, no reason for this Court to review the

* Petitioner complains, for the first time in this litigation, that neither the District Court nor the Court of Appeals followed FED. R.CIV.P. 56, insofar as they improperly considered the affidavit of Respondent Lisle, which contained allegedly hearsay statements. Respondents note that neither the District Court nor the Court of Appeals relied on the Lisle affidavit in evaluating whether there were triable issues of fact. On these matters, both courts quite properly uniformly relied on Petitioner's pleadings and affidavit, always resolving any "ambiguities" (576 F.2d at 456) in the light most favorable to him.

** Nowhere does Petitioner state what materials he would have produced or factual assertions he would have made had he "known" that Respondents' motion would be treated as one for summary judgment.

Court of Appeals' determination to treat the District Court's decision as one for summary judgment.*

The Petition (at pp. 16-17) belabors the Court of Appeals' findings (all in Petitioner's favor) as to Justice Thompson's activities with respect to *Herrmann* v. *Crea,* without suggesting any specific disagreement with any of them. Both courts below found that Justice Thompson—even if acting under color of state law—did nothing adversely to affect the outcome of *Herrmann* v. *Crea.* Nowhere does Petitioner suggest what additional facts he might have introduced on that issue, nor did he introduce any below. The Court of Appeals, therefore, was correct in bypassing the state action question and resting its affirmance on the absence of any triable issue of actual deprivation of any right. (576 F.2d at 456).**

Petitioner does suggest at one point that his "additional legal fees and the chilling effect on [his] rights of free

* Once again, Petitioner raises an issue here, namely his purported lack of opportunity to tell the whole story, which was not raised below. This issue need not be considered. *See Youakim* v. *Miller,* 425 U.S. 231, 234 (1976), and the other cases cited at page 11, *supra,* note. Moreover, because FED.R.CIV.P. 12(b) put former Professor Herrmann on notice that he was faced with a summary judgment situation in the District Court, he was in a position to raise the point in his appeal to the Court of Appeals. In his brief, however, he did not even suggest that he might have raised additional factual issues before the District Court or what those issues might have been.

** Petitioner's citation of *Adickes* v. *S. H. Kress & Co.,* 398 U.S. 144 (1970), and of the other cases at the end of his discussion (Pet., p. 19), therefore cannot salvage his claim. In *Adickes,* for example, plaintiff's factual assertions regarding state action had not been given adequate consideration in the granting of summary judgment against her on that issue below. 398 U.S. at 156-60. Here, Petitioner's extravagant claims were taken as true. His failure to suggest that Justice Thompson's actions under color of law had any effect on *Herrmann* v. *Crea,* however, confirms the correctness of the opinions below.

speech and access to the courts" (Pet., p. 4), resulting from Justice Thompson's alleged intimidation, provide the requisite deprivation. Whatever subjective chilling Petitioner allegedly experienced, however, *see Laird* v. *Tatum,* 408 U.S. 1 (1972), no cognizable deprivation is made out. *Cf. Bradford Audio Corp.* v. *Pious,* 392 F.2d 67, 71-72 (2d Cir. 1968) (although judge with pecuniary interest in case illegally appointed receiver for plaintiff corporation, no violation of Section 1983 where another judge made final decision).*

* Moreover, the court below could have decided the same way on another separate ground briefed below, namely Justice Thompson's total immunity, *see Stump* v. *Sparkman,* 435 U.S. 349 (1978); *Pierson* v. *Ray,* 386 U.S. 547 (1967); *Kurz* v. *State of Michigan,* 548 F.2d 172, 174 (6th Cir. 1977); *Bradford Audio Corp.* v. *Pious, supra;* which extends even to acts committed " 'in excess of [a judge's] jurisdiction, and . . . maliciously' ", *Stump* v. *Sparkman, supra,* 435 U.S. at 356; *Duba* v. *McIntyre,* 501 F.2d 590, 592 (8th Cir. 1974), *cert. denied,* 424 U.S. 975 (1976).

Since Justice Thompson enjoys immunity for any actions taken in his official capacity, none of his alleged co-conspirators (the other Respondents herein)—who were not otherwise acting under color of law with respect to *Herrmann* v. *Crea*—can be held liable therefor. *See Dacey* v. *Dorsey,* 568 F.2d 275, 277 (2d Cir. 1978); *Kurz* v. *State of Michigan,* 548 F.2d 172, 175 (6th Cir. 1977); *Hansen* v. *Ahlgrimm,* 520 F.2d 768, 770-71 (7th Cir. 1975); *Sykes* v. *California,* 497 F.2d 197, 202 (9th Cir. 1974); *Guedry* v. *Ford,* 431 F.2d 660, 664 (5th Cir. 1970); ***McIntosh*** **v.** ***Garofalo,*** **367 F.Supp. 501, 504-05 (W.D. Pa. 1973).** ***Contra, Kermit Construction Corp.*** **v.** ***Banco Credito Y Ahorro Ponceno,*** **547 F.2d 1 (1st Cir. 1976).**

CONCLUSION

As Judge Wyzanski's opinion in the Second Circuit was based upon well-established legal principles as well as findings of fact unique to this matter, Respondents Brooklyn Law School, *et al.,* submit that plenary review of that opinion by this Court would be inappropriate and respectfully request that the Petition be denied.

Dated: New York, New York
November 10, 1978

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1978

No. 78-583

WILLIAM S. HERRMANN,

Petitioner,

vs.

LEONARD P. MOORE, ABRAHAM M. LINDENBAUM, PAUL WINDELS, WILLARD G. HAMPTON, WILBUR A. LEVIN, MICHAEL CHARLES O'BRIEN, JEROME PRINCE, HOLLIS K. THAYER, M. HENRY MARTUSCELLO, EDWARD THOMPSON, CECILY SELBY, JOHN DOAR, MICHAEL P. SHUMAECKER, ERIC NELSON, BROOKLYN LAW SCHOOL, RAYMOND E. LISLE, GERARD A. GILBRIDE, MILTON GABRIEL GERSHENSON, JOSEPH CREA, SAMUEL HOFFMAN, JOHN J. MEEHAN, PHILIP K. YONGE, RICHARD T. FARRELL, MARTIN R. HAUPTMAN, JEROME M. LEITNER, DAVID G. TRAGER, HENRY MARK HOLZER, OSCAR CHASE, BRIAN E. COMERFORD, RICHARD ALLAN, MARGARET A. BERGER, GEORGE W. JOHNSON, SUSAN M. BRANDT, DEBORAH H. SCHENK, PAUL SHERMAN, GARY A. SCHULTZE, DUSAN DJONOVICH, STEVEN S. ELBAUM AND S. HAL MERCER IV,

Respondents.

Supreme Court, U. S.
FILED
NOV 29 1978
MICHAEL RODAK, JR., CLERK

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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In The

Supreme Court of the United States

October Term, 1978

No. 78-583

WILLIAM S. HERRMANN,

Petitioner,

vs.

LEONARD P. MOORE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR CERTIORARI

This reply brief is submitted on behalf of petitioner, William S. Herrmann, and is addressed to arguments first raised in the respondents' brief in opposition to the petition. It does not address every argument or allegation of respondents but only those which petitioner respectfully thinks are relevant and will aid this Honorable Court in its decision.

COUNTERSTATEMENT OF FACTUAL BACKGROUND

The status of the litigation referred to by defendants in their brief in opposition to the petition for a writ of certiorari are in the following posture before the courts:

1. William S. Herrmann, Jr. v. Joseph Crea, Civil Court of the City of New York, County of Kings, Index No. 24915, terminated when Crea apologized in open court to the petitioner for his slanderous statements. A copy of the minutes of the court containing the apology is reprinted in the appendix to this brief (1a-10a).

2. William S. Herrmann, Jr. v. Brooklyn Law School, et al., Supreme Court, State of New York, County of Kings, Index No. 11364/75, was an action for a temporary injunction. When the temporary injunction was denied the issue became moot. Said case is still pending before the Supreme Court, Kings County.

3. William S. Herrmann v. Raymond E. Lisle, Joseph Crea, Philip K. Yonge and David G. Trager, United States District Court, Eastern District of New York, No. 75 Civ. 130 is awaiting trial before Judge Sifton momentarily.

4. William S. Herrmann v. Brooklyn Law School, Supreme Court, State of New York, County of New York, Index No. 23498/76, is a contract action which is at issue. The preliminary proceedings have been recently completed and it will be presently noticed for trial.

Respondents claim that petitioner was dismissed as a tenured professor from the Brooklyn Law School after the necessary procedural steps were taken to institute a hearing by the full faculty on the trustee petition. In fact, the so-called "hearing" was an inquest held by the respondents without any representation for the petitioner or any evidence being presented

on behalf of the petitioner due to the absence of petitioner's counsel who shortly prior to the hearing was engaged in American Bar Association activities during the annual convention which was being held in Montreal, Canada.

The attorney for the petitioner had written and advised the respondents that he could not be present at the time of the hearing because of these commitments and the resultant lack of time to prepare for the hearing and requested an adjournment. Rather than grant a short, reasonable adjournment, the respondents proceeded without the presence of petitioner's attorney or the petitioner and turned what they allege to be a hearing into an informal discussion with no semblance of either procedural or substantive due process. In essence they held a classic kangaroo court.

ARGUMENT

I.

The improper activity of a state judge constituted a deprivation of petitioner's due process rights. The holding of the lower court to the contrary decided a federal question in conflict with applicable decisions of this Court.

Respondents rely heavily on the fact that "the Court of Appeals' finding (all in Petitioner's favor) as to Justice Thompson's activities with respect to *Herrmann v. Crea*" (Respondents' Brief, p. 19) did not include a finding of "deprivation of any right." (576 F.2d at 456, Petition, p. 11a).

It is respectfully submitted that respondents' reliance on that "finding" is totally misplaced in view of the fact that a judicial officer's unilateral intervention in a case not before him is so unequivocably a deprivation of petitioner's constitutional rights that any holding to the contrary is clearly in direct conflict with applicable decisions of this Court.

Petitioner produced evidence to the effect that Justice Thompson, the administrative judge in charge of the court in which *Herrmann v. Crea* was pending, intervened in that action by speaking to the judge before whom the case was pending, by warning petitioner to drop his suit and by arranging to have the chief law assistant for the civil court accompany a witness, as counsel, in the counterclaim filed against petitioners (576 F.2d 456, *et seq.;* Petition, pp. 8a-11a; Memorandum to File of Dean Lisle, Petition, p. 46a).

The court held that by virtue of the fact that petitioner prevailed on the counterclaim there could have been no "deprivation" by the intimidation exercised by respondents, as such was intended by 42 U.S.C., Section 1983 (*id.*) or by the Due Process Clause of the Constitution.

To argue that the unilateral intercession by a superior judicial official in a case not before him or the intimidation of a litigant is not a deprivation of due process, is to misconstrue not only the meaning of the word "deprivation" but to also misconstrue the conception of "due process."

"Due process" represents and is compounded of "a profound attitude of fairness between man and man, and more particularly between the individual and government . . . and stout confidence in the strength of the democratic faith which we profess." *Joint Anti-Fascist Refugee Com. v. McGrath,* 341 U.S. 123, 163, Frankfurter, J. concurring.

To assert that a warning by a state administrative judge* that "your case is going nowhere, I have spoken to Judge Kleiger . . ." (576 F.2d at 455; Petition, p. 9a) is not a

* While arguing that Thompson was not acting in any official capacity respondents also assert that as a justice, Thompson enjoys total immunity (Respondents' Brief, p. 20, note), an inconsistency which is but one of respondents' minor ones.

"deprivation" of the "stout confidence in the strength of the democratic faith" is wholly unrealistic. To allege that such illegal or improper intervention does not deprive one of "that feeling of just treatment" (*Joint Anti-Fascist Refugee Com., supra*) which is the cornerstone of the right to due process, is wholly naive.

The law needs no elaboration that a "chilling" of one's constitutional rights constitutes a deprivation. *Davis v. Village Park II Realty Co.,* 578 F.2d 461.

Citing *Laird v. Tatum,* 408 U.S. 2, respondents assert that no cognizable deprivation is made out. *Laird v. Tatum,* as also *Bradford Audio Corp. v. Pious,* 392 F.2d 67, the other case cited by respondents, are to the extent they are applicable, wholly supportive of petitioner's position.

Laird v. Tatum involved the gathering of information on various individuals by Army Intelligence. Respondents, objecting thereto, conceded that "they complain of no specific action of the Army against them" (408 U.S. 9) and indeed respondents thereat argued that "we're not quite sure exactly what they have in mind and that is precisely what causes the chill." (*Id.* at 408 n. 5.) The Court, quite properly, felt this was too tenuous or speculative a fear.

In the case at bar, petitioner knows exactly what Justice Thompson had in mind, and it is respectfully submitted that nothing could be more chilling.

In *Bradford Audio Corp. v. Pious,* 392 F.2d 67, the Second Circuit dismissed the action, arising essentially out of an alleged infringement of property rights, as not being within the purview of §1983. "To qualify under §1983 the right sought to be enforced must in the main be one incapable of pecuniary evaluation, such as personal liberty, unrelated to and not dependent upon an invasion or deprivation of property interests." (392 F.2d 72).

It is submitted that the rights sought to be enforced in the case at bar fall directly within the scope of the limitations enumerated.

The district court, in holding against petitioner, found there to have been no "damages" as a result of Thompson's actions. Increased legal fees and emotional distress evidently were not considered sufficient damages to merit consideration. *(Herrmann v. Moore, et al.,* ____ F. Supp. 2d ____, Petition, p. 24a). Subsequent to that decision, this Court ruled, in *Carey v. Piphus,* ____ U.S. ____, 55 L. Ed. 2d 252, that §1983 is actionable notwithstanding that there are no actual damages.

The circuit court's affirmance of the lower court decision rested therefore on the premise, based only on a paper record with no trial or hearing ever having been had, that plaintiff-petitioner failed to demonstrate "deprivation" rather than damages.

It is submitted that the court below misconstrued the thrust of *Carey v. Piphus* and simply interpreted "deprivation" as another form of "damages" or as "actual injury" with a concomitant feature of tangibility.

This Court stated in *Carey v. Piphus,* 55 L. Ed. 2d at p. 267:

> "Because the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed (citing cases) we believe that the denial of procedural due process should be actionable for nominal damages *without proof of actual injury."* (Emphasis added.)

The court below found that ". . . Thompson did not adversely affect that suit . . . . Thus, plaintiff has failed to show, as is

required by 42 U.S.C. §1983 that under color of law he actually 'subjected' plaintiff to the 'deprivation' of any Constitutional rights." (576 F.2d 456; Petition, pp. 10a, 11a).

The lower court thus held "deprivation" to be inextricably linked with "adverse affect," a conclusion which we submit is contrary to the intention of this Court in *Carey v. Piphus, supra,* and in conflict with other applicable decisions of this Court.

Clearly "adverse affect" is legally synonymous at bar with "actual injury." Just as clearly petitioner should have been given the opportunity to present his case even "without proof of actual injury." *(Carey v. Piphus, supra).*

Deprivation of rights afforded under the Due Process Clause, like due process itself, "means many different things in the numerous contexts in which it applies." *Board of Regents v. Roth,* 408 U.S. 564, 590 (Justice Marshall dissenting). "The precise nature of the interest that has been adversely affected, the manner in which this was done, . . . the protection implicit in the office of the functionary whose conduct is challenged . . . these are some of the considerations that must enter into the judicial judgment." *Joint Anti-Fascist Refugee Com. v. McGrath, supra* at 163.

The court below has decided a federal question in a way in conflict with applicable decisions of this Court which it is respectfully submitted calls for the exercise of this Court's discretion.

CONCLUSION

Petitioner respectfully prays that a writ of certiorari to the United States Court of Appeals for the Second Circuit be granted.

Dated: New York, New York
November 27, 1978

Respectfully submitted,

s/ John F. Martin
Attorney for Petitioner

APPENDIX

MINUTES OF THE CIVIL COURT OF THE CITY OF NEW YORK IN HERRMANN v. CREA, INDEX NO. 24915/73

CIVIL COURT OF THE CITY OF NEW YORK

COUNTY OF KINGS

WILLIAM S. HERRMANN, JR.,

Plaintiff,

-against-

JOSEPH CREA,

Defendant.

Index No.

24915/73

TRIAL TERM, PART 26
141 Livingston Street
Brooklyn, New York
June 6, 1977

B e f o r e:

HONORABLE MORGAN LANE, Judge, and a jury of six.

A p p e a r a n c e s:

JOHN F. MARTIN, ESQ.
Attorney for Plaintiff
342 Madison Avenue
New York, N.Y. 10017

Minutes

JOSEPH CREA, ESQ. (Pro se)
250 Joralemon Street
Brooklyn, New York 11201
BY: JEROME M. LEITNER, ESQ., of Counsel
Attorney for Defendant

Joseph A. Penta
Official Court Reporter

[2] Brooklyn, N.Y., June 6, 1977.

THE COURT: May the record show that this stipulation is being put on the record in this matter in the presence of William S. Herrmann, Jr., who is the plaintiff and he is represented by Mr. John F. Martin of 342 Madison Avenue, Manhattan; the [sic] the defendant, Joseph Clea, [sic] who is represented by Mr. Jerome Leitner and whose address is 250 Joralemon Street, Brooklyn.

This matter, which is an action for slander, was brought in, sent into this part, which is a trial part, by Judge Gasper Fasullo, who is conducting the calendar next door.

And the Court had an opportunity of setting with Mr. Martin, John F. Martin, attorney for the plaintiff and Mr. Jerome Leitner, attorney for the defendant, and conferred in this matter [3] with the intention of possibly adjusting this matter to the satisfaction of both sides.

It is ten minutes after 4:00, and I think we will agree that this conference for a possible adjustment started shortly after 2:00 p.m.

MR. MARTIN: Yes.

MR. LEITNER: Precisely.

Minutes

THE COURT: 2:00 p.m. today.

After various negotiations, the Court was able to have both counsel arrive at a statement to be made by the defendant, Joseph Crea, which is going to be made within a few moments, to adjust this matter to the satisfaction of all parties concerned.

And while I'm putting this stipulation on the record, I want to express the Court's commendation to both counsel, shall I say, for their competency in discussing this matter with me in their zealous desire to [4] protect the rights of both their respective clients and adhering to the Court's suggestion and admonition that a matter of this kind would best be solved by an amicable adjustment because of the undue publicity which may arise in the event that this case did go to trial.

The Court, with the cooperation of both counsel, was able to arrive at a statement which the defendant, Joseph Crea is going to make on the record at this time in regard to the possible adjustment of this matter.

Now, Mr. Crea, you have had an opportunity of conferring with counsel, have you not?

THE DEFENDANT: I have.

THE COURT: And you are desirous of making the statement now to the Court and to this party-plaintiff?

THE DEFENDANT: I am.

THE COURT: Please make the statement.

THE DEFENDANT: I apologize for anything that I said regarding William S. Herrmann, Jr. [5] on March 20th, 1973, at a meeting of the faculty at Brooklyn Law School.

THE COURT: Now, the other pertinent parts of this adjustment are as follows:

There is to be no monetary consideration made on behalf of either side, and Mr. William S. Herrmann, Jr. has agreed that there will be no releases to any publication of any kind and the same goes for Mr. Crea, and both sides have agreed that if any inquiry is made in regard to this matter, that both sides in substance will say "That this matter has been adjusted to our mutual satisfaction."

Now, Mr. Leitner, as attorney for the defendant — I want to start with the plaintiff. Mr. Martin, as attorney for the plaintiff, has everything that I put on this record, is that in accordance with your understanding of the settlement of this case?

MR. MARTIN: Yes, it is in accordance with my understanding of the [6] settlement, yes, your Honor.

THE COURT: Is there anything you want to add or supplement in this stipulation?

MR. MARTIN: No, this is perfectly agreeable.

THE COURT: Now, Mr. Leitner, as attorney for the defendant, is everything that's on the record, is that in accordance with your understanding?

MR. LEITNER: Yes, sir. I would like to add —

THE COURT: If there is anything you want to add, submit it to the Court.

MR. LEITNER: I ask this — I'm not sure that it is necessary, but for the sake of completion, I would like to say a few words.

THE COURT: Put it on the record. Let the record be complete.

MR. LEITNER: I would like it to be understood that the school newspaper "Justinian," is included in publications in connection with your admonition a few moments [7] ago, that they are not to be notified by either side. I'm sure that is agreeable.

And I, as counsel to Professor Crea, consider myself bound by the admonitions regarding confidentiality and I am sure that Mr. Martin likewise does, too.

MR. MARTIN: I don't think there is any necessity. I automatically assume that I am bound by it. There is no necessity of expressing it to the Court.

MR. LEITNER: Fine.

THE COURT: Mr. Crea and Mr. Herrmann, you both were in my chambers and all of this was discussed before; is that correct?

THE PLAINTIFF: Yes.

THE DEFENDANT: Yes.

THE COURT: I advised both of you that I am going to put both of you under oath so the record will be complete, so Mr. Herrmann, will you please take the stand.

WILLIAM S. HERRMAN, Jr., 16 Oak Street, Stamford, Connecticut, the plaintiff, called as a witness in his [8] own behalf, being first duly sworn, testified as follows:

EXAMINATION BY

THE COURT:

Q. Now, Mr. Herrmann, sir, so the record will be complete, on or about the 20th day of March, 1973, you were at that time a member of the faculty of the Brooklyn Law School; is that correct? A. That's correct.

Q. And, Mr. Joseph Crea at or about that time was also a member of the Brooklyn Law School? A. That's correct.

Q. And at a meeting of the faculty on that day, some statement was allegedly made by Mr. Crea for which you brought this lawsuit in slander against Mr. Crea; is that correct? A. That's correct.

Q. You have appeared by your attorney, Mr. Martin, and Mr. Crea is appearing here with [9] his attorney, Mr. Leitner; is that correct? A. Correct.

Q. And after negotiations by myself together with your attorneys and Mr. Crea's attorney, a statement was offered by the defendant in regard to the alleged statements that he made on March 20th, 1973 wherein in substance he apologized therefor.

That is being accepted by you in adjustment and full settlement of this matter; is that correct? A. That's correct.

Q. Now, before this stipulation was put on the record, Mr. Martin, as your attorney, had an opportunity of conferring with you, or you with him; is that correct? A. Yes, I did.

Q. In that conference, you advised Mr. Martin that this statement would be satisfactory to you, in full settlement of this matter, period? A. Yes, but I don't know if you —

[10] Q. The ultimate result was that you have accepted this statement and so advised Mr. Martin? A. I have.

Q. Is that correct? A. That's correct.

Q. Now, Mr. Herrmann, part of the agreement also was that this matter — both of you being faculty members of Brooklyn Law School — receive no further publicity, and you agree not to release or give any releases to any publication whatsoever in regard to this adjustment? A. Yes, I agree.

Q. And you further agree in the event any inquiry is made, your statement would be that the matter has been adjusted to our mutual satisfaction? A. I'll refer it to my attorney.

Q. Is everything that has been agreed in this court now on this stipulation? A. As far as I know.

Q. Is there anything you want to add to it? [11] A. No.

Q. Is there anything that is not clear and you want any further advice from the Court? A. No.

THE COURT: Mr. Martin, do you want to ask him any questions?

MR. MARTIN: No.

THE COURT: Mr. Leitner?

MR. LEITNER: No, sir.

THE COURT: Mr. Herrmann, thank you very much.

(The witness was excused from the stand.)

THE COURT: Mr. Crea, please step up here.

JOSEPH CREA, 1551 East 17th Street, Brooklyn, New York, the defendant, called as a witness in his own behalf, being first duly sworn, testified as follows:

EXAMINATION BY

THE COURT:

Q. Mr. Crea, you are the defendant in this action of William S. Herrmann, Jr. against [12] Joseph Crea, wherein you are being sued for an alleged statement which the plaintiff contends was slanderous, on March the 20th, 1973 at a meeting of the faculty in Brooklyn Law School; is that correct? A. That's correct.

Q. You are represented by Mr. Leitner, who is standing here in court; is that correct? A. I am.

Q. And he had an opportunity of conferring with you regarding a possible adjustment in this matter? A. He has, yes.

Q. After conferring with him, you have made a statement in open court, which I'm going to read, wherein you said: "I apologize for anything I said regarding William S. Herrmann, Jr. on March 20th, 1973 at a meeting of the faculty of Brooklyn Law School"; is that correct? A. Yes.

[13] Q. Now, you did make such a statement? A. I admit it.

Q. And this was after you conferred with your attorney, Mr. Leitner? A. That's correct.

Q. Now, the understanding is that this will be in full settlement of this lawsuit against you? A. I so understand.

Q. And you understand that you both agree, both you and Mr. Herrmann, that there will be no publicity, no releases to any publications of any kind in regard to this matter? A. I agree.

Q. And you further agree that if inquiry is made, that your statement in substance will be that the matter has been adjusted to your satisfaction? A. That's correct.

Q. Firstly, is the stipulation in the record in accordance with your understanding? A. It is.

[14] Q. Is it satisfactory? A. Yes, sir.

Q. Is there anything that you want to add? A. I do not.

THE COURT: Mr. Leitner, anything that you want to ask of your client?

MR. LEITNER: No, sir.

THE COURT: Mr. Martin, anything that you want to ask of him?

MR. MARTIN: No.

THE COURT: I ask both of you attorneys if there's anything you want to add to the stipulation and you both said no?

MR. MARTIN: That's correct.

MR. LEITNER: That's correct.

THE COURT: You may step down.

(The witness, Mr. Crea, left the witness stand.)

THE COURT: Gentlemen, the matter is adjusted pursuant to the stipulation on the record, and I want once again to express my [15] commendation sincerely to both you, Mr. Leitner, and Mr. Martin, for assisting in helping the Court in a very conscientious and competent manner in bringing an understanding wherein both of your respective clients have adjusted this matter.

MR. MARTIN: I'd like to thank the Court also for its good offices in helping to effectuate the settlement.

MR. LEITNER: With this particular case with all that was involved, may I express my thanks and my admiration for your skill and efforts for disposing of it so amicably.

THE COURT: Gentlemen, it's a pleasure to be of service to you.

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CERTIFIED TO BE A TRUE AND CORRECT TRANSCRIPT OF THE WITHIN MINUTES.

s/ Joseph A. Penta
Joseph A. Penta
Official Court Reporter.